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FEDERAL COMMUNICATIONS COMMISSION

RICHARD E. WILEY, Chairman
ROBERT E. LEE
CHARLOTTE T. REID
BENJAMIN L. HOOKS

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FCC 74-207

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 76 OF THE COMMISSION'S RULES AND REGULATIONS RELATIVE TO OBLIGATIONS OF CABLE TELEVISION SYSTEMS TO MAINTAIN PUBLIC INSPECTION FILES, KEEP RECORDS OF SUBSCRIBERS, AND PERMIT SYSTEM INSPECTIONS	Docket No. 19948

NOTICE OF PROPOSED RULEMAKING

(Adopted February 27, 1974; Released March 6, 1974)

BY THE COMMISSION: COMMISSIONER REID CONCURRING IN THE RESULT.

1. In the time since our adoption of the *Cable Television Report and Order*, 36 FCC 2d 143, we have had cause to be concerned whether our existing cable television rules provide adequate procedures for public participation in our processes. Many members of the public apparently wish to comment on application for certificates of compliance or requests for special relief,[1] but have difficulty in obtaining copies of filings. We thus find a need to codify public inspection file requirements for cable television systems.

2. To be sure, Section 76.13(a)(7) of the Rules requires an application or a certificate of compliance to represent that it is available locally "for public inspection."[2] It does not clearly state whether it requires the system to keep the application or related papers on file after grant of a certificate, however, and does not by its terms apply to petitions for special relief.[3] Requiring cable systems to maintain a public inspection file merely follows our policy for broadcast licensees[4] and is necessary for similar reasons. If the public is to play an informed role in the regulation of cable television, it must have at least basic information about a local system's operations and proposals. And as we noted in promulgating the public inspection file rules for broadcast licensees, "our primary purpose in the present proceeding is to make information to which the public already has a right more readily

[1] Sections 76.13, 76.7 of the Commission's Rules.

[2] Section 76.13(a)(7) of the Rules provides that: "(a) For a cable television system not operational prior to March 31, 1972 (other than systems that were authorized to carry one or more television signals prior to March 31, 1972, but did not commence such carriage prior to that date), an application for certificate of compliance shall include: (7) A statement that a copy of the complete application has been served on the franchising authority, and that if such application is not made available for public inspection by the franchising authority, the applicant will provide for public inspection of the application at any accessible place (such as a public library, public registry for documents or an attorney's office) in the community of the system at any time during regular business hours;"

[3] At least in theory, a system therefore could request waiver of an obligation in its certificate of compliance the day after the certificate was granted, without making its petition available for public inspection or comment.

[4] Section 1.526.

available, so that the public will be encouraged to play a more active part in a dialogue. . . . we seek to enhance the effectiveness of this policy by making practically accessible to the public information to which it is entitled." *First Report and Order in Docket No. 14864*, FCC 65–273, 4 RR 2d 1664, 1667–68. Accordingly, we believe that a similar requirement for cable television systems would be appropriate.

3. A related problem is physical inspection of system facilities. Since our technical standards are now partially applicable to older systems and fully applicable to newer ones,[5] we will be taking an affirmative role in policing systems' compliance. Though Commission personnel have not discovered any difficulty in obtaining access to system facilities, we nevertheless wish to clarify cable operators' obligations to allow reasonable inspections.

4. We therefore believe that these requirements are in the public interest. In this regard, we do not believe that the rules would impose any serious burdens upon cable television systems. Systems have the required information already; the rules just state the circumstances under which they must make it available to the public.

5. Section 76.305 follows both the general thrust and specific language of the public inspection file requirement for broadcast licensees. To be sure, the Commission already maintains on public file all documents which the rule requires a cable television system to place in its public inspection file. But as we noted in promulgating a similar rule for broadcast licensees:

> The information is already a matter of public record available at the Commission's offices in Washington. We do but recognize the fact that the existence hundreds, and in some cases thousands, of miles away of a voluminous public file is of little practical value in providing interested persons with the kind of information needed . . .[6]

The public has a real need for ready access to systems' filings. Certification renewals are too infrequent to provide the public with the same "dialogue" as license renewals. The public thus needs accurate and accessible information about a cable television system's status before this Commission. Section 76.305 will do this at little cost to cable systems.

6. Section 76.305(a)(1) thus would require cable television systems to keep on public file all documents relevant to the acquisition of franchises and other local or state authorizations. Our rules already require a franchise to state that it was granted "as part of a full public proceeding affording due process."[7] The public cannot comment on the presence or absence of the required proceeding, however, if it does not have access to the relevant documents. Accordingly, they must be part of the public inspection file. We are aware, of course, that many local authorities already require these documents to be available for

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[5] Section 76.605.

[6] 4 RR 2d at 1667.

[7] Section 76.31(a)(1) of the Rules provides that: "(a) In order to obtain a certificate of compliance, a proposed or existing cable television system shall have a franchise or other appropriate authorization that contains recitations and provisions consistent with the following requirements: (1) The franchisee's legal, character, financial, and other qualifications, and the adequacy and feasibility of its construction arrangements, have been approved by the franchising authority as part of a full public proceeding affording due process;"

public inspection; but since Section 76.305(b) would allow a cable system to locate its public inspection file in a "public registry," the requirement will be unnecessary at worst.

7. Similarly, Section 76.305(a)(2) would require cable systems to keep on file applications for certificates of compliance and all related material. As noted in paragraph 2, our present rules do not explicitly require a cable system to keep an application on file after it is granted. The application contains many crucial representations, however, as to a system's plans for signal carriage, franchise obligations, and access cablecasting. Accordingly, the public can evaluate a system's performance only by referring to its applicaton for certification. And as discussed before, its "existence hundreds, and in some cases thousands, of miles away" is hardly useful. Moreover, applications for certification may be remote in temporal as well as spatial terms. Since a certificate can be valid for as long as fifteen years, the public may need to locate an application almost a generation after its initial filing.

8. Section 76.305(a)(3) would set similar standards for show cause proceedings and waiver requests. Our present rules do not explicitly require cable systems to keep any public records at all of these proceedings. The public has a very real interest, however, in both show cause and waiver petitions.[8] Members of the public may wish to support or oppose a show cause petition or a waiver request. But they cannot participate unless they have access to the relevant documents.

9. Section 76.305(a)(4), (5), (6) simply would consolidate and codify our existing rules. Thus, Section 76.305(a)(4) merely clarifies a cable system's obligation to keep a Form 325 [9] on file after a certificate of compliance has issued; since a Form 325 contains vital information about a cable system's operations, the public needs it in order to measure a cable system's performance. Similarly, Section 76.305(a)(5) repeats present Section 76.305(a) virtually verbatim, except that it requires a system to list all signals carried, rather than just all additional signals carried. And Section 76.305(a)(6) merely restates present Section 76.305(b).

10. Section 76.305(b) attempts to strike a reasonable balance between hardship for a cable system and convenience for the public in location of the public inspection file. Accordingly, it requires a cable television system to keep the file where it ordinarily transacts business—a location which presumably is familiar and accessible to the public.[10] Similarly, Section 76.305(b) requires that the file be available only during "regular business hours," in order to avoid imposing an undue hardship on cable systems.

11. Section 76.305(c) would specify varying periods of retention for the different types of documents to which Section 76.305(a) applies. A

[8] For example, in *Columbia Television Company, Inc.*, FCC 73-903 —— FCC 2d ——, we held that a system's dual-rate structure violated the rules — a decision which might have concerned local citizens.

[9] Section 76.401 of the Rules. As with the other contents of an application for a certificate of compliance, the present rules do not specify how long a Form 325 must be kept on public file. See paragraph 2, *supra*.

[10] We contemplate requiring additional locations, however, where a member of the public demonstrates that the location of the public inspection file in fact is inconvenient—e.g., a multiple systems operator with one office for all operations in a number of states. Conversely, where a cable television operator shows that it maintains several business offices in close proximity to each other, we will waive the requirement that it maintain a public inspection file at each one.

cable system thus must keep applications for franchises, certificates of compliance, and petitions for special relief on file for the duration of its initial and renewal certification, since the public may wish to inquire into a system's statements years after they originally are made. Systems must keep copies of a Form 325 for only two years, however, since the information is updated annually and does not contain significant representations. And the new rule reduces the retention period for signal carriage records from two years to one year; this more limited time seems appropriate in light of the new obligation to make a Form 325 available, however, since the two documents contain very similar information.

12. Finally, Section 76.307 would establish cable operators' obligation to allow authorized Commission representatives to inspect their systems' physical facilities. We believe that the rule will be useful to both Commission employees and cable operators by defining the appropriate personnel and time for an inspection.

13. The new rules thus would impose on cable systems some, but not all, of the record keeping procedures which broadcast licensees have borne for years. The rules should not cause any undue inconvenience, since they do not require most cable operators to produce material which they do not normally maintain. Through greater disclosure we hope to encourage a greater interaction between the Commission, the public, and the cable industry.

14. Authority for the proposed rule making instituted herein is contained in Sections 4(i), 303 and 403 of the Communications Act of 1934, as amended.

15. All interested persons are invited to file written comments on the rule making proposals on or before April 12, 1974, and reply comments on or before April 22, 1974. In reaching a decision in this matter, the Commission may take into account any other relevant information before it, in addition to the comments invited by this Notice.

16. In accordance with the provisions of Section 1.419 of the Commission's Rules and Regulations, an original and 14 copies of all comments, replies, pleadings, briefs, or other documents filed in this proceeding shall be furnished to the Commission. Responses will be available for public inspection during regular business hours in the Commission's Public Reference Room at its Headquarters in Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX

Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

A. PART 76—CABLE TELEVISION SERVICE

1. § 76.305 is deleted.
2. Section 76.305 is added to read as follows:

§ 76.305 Records to be maintained locally by cable television systems for public inspection.

(a) *Records to be maintained.* Every cable television system shall maintain for public inspection a file containing the following:

(1) A copy of every application for a local and/or state franchise or other authorization and all exhibits, letters and other documents tendered for filing as part thereof, all amendments thereto, copies of all documents incorporated therein by reference, all correspondence between the applicant and the franchising authority pertaining to the application after it has been tendered for filing, and copies of all documents pertaining thereto issued by the franchising authority. Information incorporated by reference which is already in the local file need not be duplicated if the entry making the reference sufficiently identifies the information so that it may be found in the file, and if there has been no change in the document since the date of filing and the applicant, after making the reference, so states.

(2) A copy of every application for a certificate of compliance and all exhibits, letters and other documents tendered for filing as part thereof, all amendments thereto, copies of all documents incorporated therein by reference, all correspondence between the Commission and the applicant pertaining to the application after it has been tendered for filing, and copies of Initial Decisions and Final Decisions in hearing cases pertaining thereto, which according to the provisions of §§ 0.451–0.461 of this chapter are open for public inspection at the offices of the Commission. Information incorporated by reference which is already in the local file need not be duplicated if the entry making the reference sufficiently identifies the information so that it may be found in the file, and if there has been no change in the document since the date of filing and the applicant, andter making the reference, so states.

If an opposition to the application is filed and duly served upon the applicant, a statement that such opposition has been filed shall appear in the local file together with the name and address of the party filing the opposition.

(3) A copy of every petition for special relief filed by or against the system pursuant to Section 76.7 of this part and all exhibits, letters and other documents tendered for filing as part thereof, all amendments thereto, copies of all documents incorporated therein by reference, all correspondence between the Commission and the system pertaining to the petition after it has been tendered for filing, and copies of Initial Decisions and Final Decisions in hearing cases pertaining thereto, which according to the provisions of §§ 0.451–0.461 of this chapter are open for public inspection at the offices of the Commission. Information incorporated by reference which is already in the local file need not be duplicated if the entry making the reference sufficiently identifies the information so that it may be found in the file, and if there has been no change in the document since the date of filing and the system, after making the reference, so states. If an opposition to the petition is filed and duly served by or upon the system, a statement that such opposition has been filed shall appear in the local file together with the name and address of the party filing the opposition.

(4) A copy of every Form 325 and copies of all exhibits, letters, and other documents filed as part thereof, all amendments thereto, all correspondence between the system and the Commission pertaining to the reports after they have been filed, and all documents incorporated therein by reference which according to the provisions of §§ 0.451–0.461 of this chapter are open for public inspection at the offices of the Commission. Information incorporated by reference which is already in the local file need not be duplicated if the entry making the reference sufficiently identifies the information so that it may be found in the file, and if there has been no change in the document since the date of filing and the system, after making the reference, so states.

(5) A record of all television signals carried. Such record shall also include the call letters and location of each such station whose signal is carried pursuant to §§ 76.57(b), 76.59 (b), (c), (d), 76.61 (b), (c), (d), or (e) or 76.63(a) (as it refers to § 76.61 (b), (c), (d), or (e), the date and specific starting and ending time of such carriage, and the names of the programs scheduled to be shown.

(6) A copy of all records which are required to be kept by § 76.205(c) (origination cablecasts by candidates for public office); § 76.251(a)(11) (public access channels, educational access channels, leased access channels); § 76.306 (records of subscribers); § 76.311(f) (equal employment opportunities).

(b) *Location of records.* The public inspection file shall be maintained at the office which the cable television system maintains for the ordinary collection of subscriber charges, resolution of subscriber complaints, and other business or at any other accessible place in the cable system's community (such as a public registry for documents or an attorney's office). The public inspection file shall be available for public inspection at any time during regular business hours.

(c) *Period of retention.* The records specified in paragraphs (a) (1), (2), (3) shall be retained so long as a certificate of compliance or renewal thereof is outstanding. The records specified in paragraph (a)(4) shall be retained for two years. The records specified in paragraph (a)(5) shall be retained for one year after an amendment to such record is placed in the public inspection file. The records specified in paragraph (a)(6) shall be retained for the periods specified in §§ 76.205(c), 76.251(a)(11), 76.306, and 76.311(f) of this chapter.

3. Section 76.307 is added to read as follows:

§ 76.307 System inspection.

The operator of a cable television system shall make the system, its public inspection file, and its records of subscribers available for inspection upon request by any authorized representative of the Commission at any reasonable hour.

FCC 74–208

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of CALIFORNIA ANTENNA T–V, INC., STOCKTON, CALIF. For Certificate of Compliance	CAC–1552 CA438

MEMORANDUM OPINION AND ORDER

(Adopted February 27, 1974; Released March 7, 1974)

BY THE COMMISSION: COMMISSIONER REID CONCURRING IN THE RESULT.

1. California Antenna T–V, Inc., operates 12-channel cable television facilities at Stockton, California, located within the Sacramento-Stockton-Modesto, California television market (#25).[1] It seeks authorization to continue delivering the following signals on a grandfathered basis, pursuant to Section 76.65 of the Commission's Rules:

KTVU (Ind., Channel 2), Oakland, California.
KCRA–TV (NBC, Channel 3), Sacramento, California.
KRON–TV (NBC, Channel 4), San Francisco, California.
KPIX (CBS, Channel 5), San Francisco, California.
KVIE (ETV, Channel 6), Sacramento, California.
KGO–TV (ABC, Channel 7), San Francisco, California.
KXTV (CBS, Channel 10), Sacramento, California.
KOVR (ABC, Channel 13), Stockton, California.
KGSC–TV (Spanish lang., Channel 36), San Jose, California.
KTXL (Ind., Channel 40), Sacramento, California.

In addition, pursuant to Section 76.13(b) of the Rules, California Antenna seeks authorization to add the following signals to its current carriage:

KLOC–TV (Ind., Channel 19), Modesto, California.
KBHK–TV (Ind., Channel 44), San Francisco, California.

Its application has been opposed by Great Western Broadcasting Corporation, licensee of Television Broadcast Station KXTV, Sacramento, California.

2. On April 1, 1968, applicant gave notice of its intention to operate a cable television system at Lincoln Village West, a Stockton residential development, with its present complement of signals. Pursuant to former Section 74.1109 of the Commission's Rules, Great Western Broadcasting Corporation filed a timely petition opposing applicant's proposed carriage, which triggered the mandatory stay provisions of former Section 74.1105(c) of the Rules. Nevertheless, applicant commenced operations, providing free service to the residents of Lincoln

[1] Stockton, California, has a population of 102,633.

Village West, thereby apparently seeking to place its cable facilities outside the jurisdiction of the Commission's Rules, which define a cable television system as serving "subscribing members of the public who pay for such service." [2] In effect, California Antenna now requests that the Commission make a determination that it has been operating as a "cable television system" since its inception, and, hence, that all television signals that it carried prior to March 31, 1972, are grandfathered, pursuant to Section 76.65 of the Rules. California Antenna also requests grandfathered status with respect to all of the provisions of Section 76.251 of the Rules, thereby relieving it of the obligation to provide 20-channel capacity and full access cablecasting services until March 31, 1977. However, since under applicant's own definition of its status, it wishes to carry a "new" distant independent signal, Station KBHK–TV, it has agreed to provide a public access channel, pursuant to Section 76.251(c). In support of its position, applicant argues that even though its past free service policy precluded its system from being considered a "jurisdictional cable television system" within the meaning of the Rules, for all practical purposes, it was a cable television system burdened by the same costs and obligations. Applicant argues further that refusal to accord grandfathered status to its currently delivered signals will substantially disrupt or roll back service for some 4,500 viewers by depriving them of San Francisco Grade B signals otherwise receivable via rooftop antennas. Applicant states that in exchange for an agreement with residents of Lincoln Village West to forego rooftop antennas, it assured them of the reasonable likelihood that they would continue receiving service at least as diversified as that available through external antennas.[3]

3. We find unpersuasive applicant's argument that since the physical characteristics of its operation are identical to those of an operating cable television system, it should be entitled to grandfathered status. By commencing the delivery of free service, it sought to avoid facing the issue of Great Western's challenge to its 1968 signal carriage proposal; however, in pursuing this course, it placed itself outside of the Commission's jurisdiction. California Antenna cannot submit itself to the Commission's jurisdiction *nunc pro tunc* for signal carriage purposes without losing its "right" to carry those signals whose carriage it commenced despite Great Western's objections in 1968. Consequently, we find that, prior to March 31, 1972, applicant did not maintain an operating cable television system within the meaning of the Commission's Rules, and is not entitled to grandfathered status, pursuant to Section 76.65, for any of its presently carried television broadcast signals. Therefore, if applicant's cable operations are measured against the Commission's signal carriage rules, its carriage of Television Broadcast Stations KRON–TV, KPIX, and KGO–TV is not consistent with Section 76.61 and cannot be authorized, absent grant of special relief. Although we are not persuaded that special relief is warranted in this case, in view of California Antenna's purposeful

[2] Section 76.5(a) of the Rules.
[3] Lival, Inc., the owner of California Antenna, and homeowners at Lincoln Village West entered into restrictive covenants prohibiting rooftop antennas.

evasion of our Rules,[4] we will not require it to cease carriage of the San Francisco signals. Instead, we will dismiss California Antenna's present application without prejudice to its filing an amended application that is consistent with the requirements of Sections 76.13(a), 76.31, 76.61, and 76.251 of the Rules. In the meantime, it may continue to provide free service to its "subscribers."

Accordingly, IT IS ORDERED, That the "Objection by Great Western Broadcasting Corporation" IS GRANTED.

IT IS FURTHER ORDERED, That the "Application for Certificate of Compliance," filed by California Antenna T–V, Inc., IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

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[4] Cf. *Belle Glade Community Television Co., Inc.*, FCC 73–1211, 43 FCC 2d 988; *LaFourche Communications, Inc.*, FCC 73–122, 39 FCC 2d 472.

FCC 74-201

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of COMMUNITY CABLEVISION, INC., UNINCORPORATED AREAS OF BOONE COUNTY, ILL. For Certificate of Compliance	CAC-2670 IL198

MEMORANDUM OPINION AND ORDER

(Adopted February 27, 1974; Released March 7, 1974)

BY THE COMMISSION:

1. On June 1, 1973, Community Cablevision, Inc., filed the above-captioned application for certification of a new cable television system to serve unincorporated areas of Boone County, Illinois, surrounding Belvidere, Illinois.[1] Community proposes to supply the signals of the following television broadcast stations:

WCEE-TV (CBS, Channel 23), Freeport, Illinois.
WREX-TV (ABC, Channel 13), Rockford, Illinois.
WTVO (NBC, Channel 17), Rockford, Illinois.
WGN-TV (Ind., Channel 9), Chicago, Illinois.
WTTW (Educ., Channel 11), Chicago, Illinois.
WHA-TV (Educ., Channel 21), Madison, Wisconsin.
WVTV (Ind., Channel 18), Milwaukee, Wisconsin.
WFLD-TV (Ind., Channel 32), Chicago, Illinois.

This proposal is consistent with Section 76.63(a) of the Commission's Rules. Additionally, Community plans to construct a system with a 20-channel capacity and to provide subscribers the full complement of access facilities and services, as required by Section 76.251.

2. Community asserts the absence of an appropriate franchising authority with regulatory jurisdiction over cable systems in unincorporated areas of Boone County, and submits, to support its assertion, a letter from John H. Maville, State's Attorney for Boone County, stating that cable television franchises in Illinois can be issued only by municipal corporations. In lieu of a franchise, Community submits the following assurances:

a. Community will accomplish significant construction (at least 20 percent of its service area) within one year of certification, and will extend energized trunk cable to at least 20 percent of its service area each year thereafter.

[1] Community filed, simultaneously, an application for certification of its proposed cable system at Belvidere (CAC-2669; IL 199). This application was granted on February 25, 1974, by the Acting Chief, Cable Television Bureau, pursuant to delegated authority. Belvidere and the areas of Boone County that Community proposes to serve are located within the specified zone of the 97th-ranked Rockford-Freeport, Illinois, television market. Both applications are unopposed.

b. Increases in initial rates (which are specified in the application) "will be based upon industry standards and the revenue requirements of the system." Such increases will be implemented only after 30 days following public notice.

c. Community will maintain an office and agent in Boone County to receive, investigate, and resolve subscriber complaints. Such complaints will be investigated within three days of their receipt, and Community "will attempt to resolve them swiftly and equitably."

d. Community will conform its operations and commitments to comply with Commission standards "within one year of any modifications adopted by the Commission or at the time it applies for a new certificate of compliance, whichever occurs first."

3. Community's alternative proposal is acceptable, and should assure compliance with the substance of Section 76.31 of the Rules. As in previous cases involving such alternative proposals,[2] our certification will extend until March 31, 1977, subject to any further orders of the Commission designed to resolve general problems inherent in nonfranchised cable operations, or to address any special problems that may be brought to the Commission's attention involving cable operations in the subject community.

In view of the foregoing, the Commission finds that a partial waiver of Section 76.31 of the Rules and a grant of the above-captioned application would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the application (CAC–2670), filed by Community Cablevision, Inc., IS GRANTED, and an appropriate certificate of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

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[2] *See, e.g., Ultracom of Liberty County, Inc.*, FCC 73–1303, 44 FCC 2d 643 (1973); *Lake Telephone Co.*, FCC 73–1243, 44 FCC 2d 45 (1973).

FCC 74R-79

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of DOWRIC BROADCASTING CO., INC., BRUNSWICK, GA. INTEGRATED BROADCASTING CO., INC., JACKSONVILLE, FLA. For Construction Permits	Docket No. 19448 File No. BP-18331 Docket No. 19450 File No. BP-18493

APPEARANCES

Samuel Miller and *Mark E. Fields*, on behalf of Dowric Broadcasting Company, Inc.; *Michael L. Glaser*, on behalf of Integrated Broadcasting Company, Inc.; and *Michael T. Fitch*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted March 4, 1974; Released March 8, 1974)

BY THE REVIEW BOARD: BERKEMEYER, NELSON, AND PINCOCK.

1. The Initial Decision, released May 17, 1973, by the late Administrative Law Judge Millard F. French, proposed the grant of the application of Integrated Broadcasting Company, Inc., to construct a station in Jacksonville, Florida, on the frequency 1530 kHz using 50 kw power, daytime only, with a directional antenna, and the denial of the mutually exclusive application of Dowric Broadcasting Company, Inc., to construct a station on the same frequency at Brunswick, Georgia, using 1 kw power (500 w, CH) daytime only with a directional antenna. Judge French decided in Integrated's favor under the 307(b) issue after having held that Dowric's efforts to ascertain community needs and interests were sufficient and that the Section 73.37 overlap issue had been mooted by an amendment to Dowric's application which he permitted over the objection of both Integrated and the Bureau. Exceptions and briefs have been filed [1] but oral argument was not requested nor is it necessary. The Board agrees with the Judge's ultimate conclusion that Integrated's application should be granted and Dowric's denied, but the reasons for the Board's decision differ from his, as will be explained. Except to the extent indicated herein and in the rulings on exceptions, the findings of the Initial Decision are adopted.

[1] Dowric filed exceptions and a brief on June 13, 1973; the Bureau and Integrated filed exceptions and briefs on June 18, 1973; and Integrated filed a reply to exceptions on July 5, 1973.

OVERLAP

2. After the Review Board added an issue to determine whether Dowric's proposed 0.5 mv/m contour would overlap the corresponding contour of Station WNMT, Garden City, Georgia, in contravention of Section 73.37 of the Rules,[2] Dowric submitted an amendment to change transmitter site and specify a directional antenna to eliminate the overlap, and this amendment was accepted by the Judge, Integrated contends, as it did in argument during the hearing, that allowance of the amendment violates the provisions of Section 1.522(b) of the Rules because with the exercise of reasonable diligence in the preparation of its application or in the intervening period before designation Dowric should have foreseen the existence of prohibited overlap with the WNMT proposal and could have perfected its plans to avoid such overlap prior to designation.

3. Dowric should have depicted the contours of WNMT in its application,[3] and it has not explained why this omission occurred. Nevertheless, it is not disputed that if M–3 values are utilized in depicting the contours no overlap would be indicated. The issue was added on the basis of measurements taken along only one radial a substantial segment of which was over salt water and swampy areas along the Atlantic Coast between Brunswick and Garden City, and the contour as depicted by Integrated in its petition to enlarge shows a sudden, large dip southward of approximately twenty-one miles along the radial on which the measurements were taken. Under these circumstances, there would be no justification for concluding that had Dowric depicted WNMT's 0.5 contour on the basis of M–3 data, it would have recognized that overlap would or probably would exist. Therefore, this is not the kind of situation which could reasonably have been foreseen prior to designation so as to preclude acceptance of an amendment. On the other hand, Dowric demonstrated diligence in filing the amendment once the need therefor became apparent by designation of an issue by the Board. Moreover, acceptance of the amendment did not result in the addition of new parties or issues, it did not confer a comparative advantage on Dowric, it did not prejudice its opponent, and it did not disrupt or delay the hearing. For these reasons, the Board affirms the action of the Judge in accepting the amendment.

ASCERTAINMENT OF NEEDS

4. In specifying a *Suburban* issue against Dowric, the Commission observed "that the applicant has not explained the methodology it used to contact the interviewees, nor has Dowric said which persons contacted are community leaders and which are members of the general public." Therefore, said the Commission, it could not find "that the applicant has sought out and interviewed community leaders representative of the groups existing in the proposed service area."

5. The Judge's findings on the *Suburban* issue are brief and are contained in paragraphs 8 through 11 of the Initial Decision. He

[2] 37 FCC 2d 40, released August 9, 1972.
[3] *George E. Worstell*, 32 FCC 2d 280, 23 RR 2d 145 (1971).

found that Dowric is especially interested in serving the needs of the black community, which makes up 8,748 of the 19,585 residents of Brunswick. He concluded in favor of Dowric on this issue in paragraph 2 of his conclusions. This result has been challenged by Integrated in its exceptions and brief.

6. At the hearing, Dowric submitted a list of community leader interviews conducted by a principal of Dowric, and according to the exhibit, their selection was based on knowledge of the community as well as census and other demographic information. However, most of the persons on this list seem to have been chosen as a result of their attendance at a meeting of Concerned Citizens, a group primarily interested in obtaining improved programming for blacks over the existing stations in Brunswick. There is no apparent relationship between the activities of most of these "community leaders" and the information developed by Dowric's demographic data. Moreover, the demographic data is not sufficiently detailed to permit the Board to identify the significant groups other than blacks. As the *Primer* makes clear, in answer to Question 9,[4] an applicant "must submit such data as is necessary to indicate the minority, racial, or ethnic breakdown of the community, its economic activities, governmental activities, public service organizations, and any other factors or activities that make that particular community distinctive." The demographic material offered by Dowric, while lengthy, is very general in terms of the showing envisioned by the *Primer*, and it contains nothing relative to the public service organizations and very little with regard to economic and governmental activities. Even were the Board to assume that as to the black community Dowric had made an adequate showing, there is no way in which a similar conclusion could be made for the remainder of the town of Brunswick. Such specific demographic data as there is shows that retailing, manufacturing and farming are the principal economic activities of the county in which Brunswick is situated; yet, none of the community leaders, white or black, can be identified as being representatives of any of these areas of activity. Dowric's rationale for this type of showing appears to be that its station will serve the black citizens of Brunswick primarily, and the inference is left that ascertainment relative to the remainder of the population is unimportant. Whatever appeal this approach might otherwise have, it is unacceptable under the terms of the *Primer*. The latter requires that a dialogue be established with the leaders of each significant group within the community, and the preferred way of assuring that the leaders of each group are consulted is through the use of demographic data, as already indicated. The use of such data is not strictly required, for, as the Board noted in *Voice of Dixie, Inc. et al.*, 41 FCC 2d 550, 552, the totality of the evidence may establish an applicant's reasonable awareness of the significant population groups, their respective community leaders, and their community problems. The totality of the evidence in the instant case, however, unlike that in *Voice of Dixie*, does not satisfy these requirements, as has been noted above. In particular, it cannot be concluded that Dowric has established a dialogue with community lead-

[4] 27 FCC 2d at 683.

ers from all of the significant groupings of its population. That an applicant cannot avoid his responsibility under the *Primer* by reason of the nature of his program format and composition of the audience to which it is directed is abundantly clear from the Commission's discussion at paragraphs 57, 58 and 71 of its Report and Order on the *Primer*.[5]

7. Dowric's *Suburban* presentation is also defective in terms of consultations with members of the general public. A "random sample" of the general public must be consulted, and this may be done by taking a random selection from a city directory or telephone directory or on a geographical basis.[6] Dowric's sample does not appear to have been a random one, for of the original group, 80% were black and 20% white. The census data shows that less than half of the community is black. Nowhere does Dowric explain how it selected the members of the general public to be interviewed, and Dowric makes no pretense of a showing that the selection was random. Clearly, the problems of a community are not going to be ascertained if the interviews are heavily weighted in favor of a single segment of the population.

8. The inadequacies of Dowric's showing of the composition of Brunswick and consultations with community leaders and members of the general public make it useless to attempt an evaluation of the remainder of the ascertainment undertaking. The essentials are missing and the only conclusion the Board can draw is that Dowric has not met its burden under the ascertainment issues. *Cf. Media, Inc., et al.*, 41 FCC 2d 30 (1973). Having failed to meet its burden under the ascertainment issues, Dowric's application must be denied. Integrated, being the only remaining applicant and qualified in all respects, can be granted.

9. Accordingly, IT IS ORDERED, That the application of Integrated Broadcasting Company, Inc., IS GRANTED, and the application of Dowric Broadcasting Company, Inc., IS DENIED; and

10. IT IS FURTHER ORDERED, That the grant of the application of Integrated Broadcasting Company, Inc., is subject to the following conditions:

> Before program tests are authorized, permittee shall file with the Commission sufficient field intensity measurements made on Station WQIQ, Jacksonville, Florida, to satisfactorily demonstrate that the WQIQ radiation patterns have not changed as a result of permittee's construction. The minimum required measurements made prior and subsequent to said construction shall include at least ten (10) consecutive points for each of the radials included in the last complete WQIQ proof of performance on file with the Commission. Permittee shall assume responsibility for all costs involved in complying with this condition.
>
> Permittee shall submit data made in accordance with Sections 73.48 and 2.579 of the Rules for type acceptance of the proposed transmitter.

FEDERAL COMMUNICATIONS COMMISSION.
DONALD J. BERKEMEYER, *Member, Review Board.*

[5] 27 FCC 2d at 672–673 and at 678.
[6] 27 FCC 2d at 666–667.

APPENDIX

RULINGS ON EXCEPTIONS OF DOWRIC BROADCASTING CO., INC.

Exception No.	*Ruling*
1	Granted.
2, 3, 4, 5	Denied. Disposition of the 307(b) issue is unnecessary in view of the Board's denial of Dowric's application on other grounds.

RULINGS ON EXCEPTIONS OF INTEGRATED BROADCASTING CO., INC.

Procedural

1	Denied for the reasons stated in the decision.
2, 3	Denied in view of the Board's disposition of the case on other grounds.

Findings of Fact[1]

3, 6, 7, 8, 9, 10, 13	Denied for the reasons stated in the decision.
4, 11	Granted to the extent indicated in the decision.
5, 14, 15, 16, 17, 18, 19.	Denied in view of the disposition of the case on other grounds.
12	Granted.

RULINGS ON EXCEPTIONS OF THE BROADCAST BUREAU

1	Denied in view of the disposition of the case on other grounds.

[1] Integrated's first exception to the findings of fact is numbered 3.

F.C.C. 73D-28

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of DOWRIC BROADCASTING CO., INC., BRUNSWICK, GA.	Docket No. 19448 File No. BP-18331
INTEGRATED BROADCASTING CO., INC., JACKSONVILLE, FLA.	Docket No. 19450 File No. BP-18493
For Construction Permits	

APPEARANCES

Samuel Miller and *Mark E. Fields*, on behalf of Dowric Broadcasting Company, Inc.; *Michael L. Glaser*, on behalf of Integrated Broadcasting Company, Inc.; *Michael T. Fitch*, on behalf of Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE MILLARD F. FRENCH

(Issued May 10, 1973; Released May 17, 1973)

PRELIMINARY STATEMENT

1. By Memorandum Opinion and Order, released February 24, 1972, the Commission designated the above-captioned applications and the application of James Harry Moye for 1530 kHz, 10kw (1kw CH), Day, Waycross, Georgia, for hearing on the following issues:

1. To determine the areas and populations which would receive primary service from the applicants and the availability of other primary aural service (1 mv/m or greater in the case of FM) to such areas and populations.

2. To determine the efforts made by Dowric Broadcasting Company, Inc., to ascertain the community needs and interests of the area to be served and the means by which the applicant proposes to meet those needs and interests.

3. To determine whether the staff proposed by J. Harry Moye is adequate to effectuate his proposal.

4. To determine, in light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.

5. To determine, in light of the evidence adduced pursuant to the foregoing issues, which, if any, of the applications should be granted.

104-029—74——2

2. By Memorandum Opinion and Order, released August 9, 1972, the Review Board added the following issue to this proceeding. To determine whether the 0.5 mv/m contour of the proposed operation of Dowric Broadcasting Company, Inc. will overlap the 0.5 mv/m contour of standard broadcast Station WNMT, Garden City, Georgia, in contravention of Section 73.37 of the Commission's rules.

3. On August 3, 1972, counsel for James Harry Moye filed a petition to dismiss his application. Appropriate affidavits of no consideration were filed by Moye and the remaining applicants. By Order, released August 28, 1972, the Presiding Judge granted Moye's petition, and dismissed his application. Such dismissal mooted Issue No. 3, *supra*.

4. Prehearing conferences were held on April 4, 1972, and September 15, 1972. The hearing was held on November 8, 1972, and the record was closed on that date. Proposed findings of fact and conclusions of law were filed on January 8, 1973, and Integrated Broadcasting Company, Inc. filed reply findings and conclusions on January 22, 1973.

FINDINGS OF FACT

5. Dowric Broadcasting Company, Inc. (hereinafter Dowric), proposes operation at Brunswick, Georgia, on the frequency 1530 kHz, with a power of 1 kw (500 w, CH), daytime only, employing a directional antenna system. Integrated Broadcasting Company, Inc. (hereinafter Integrated), proposes operation at Jacksonville, Florida, on the same frequency, with a power of 50kw, daytime only, with a directional antenna system.

6. Two qualifying issues were designated against Dowric and the facts relative to such issues will be given consideration in this decision prior to the 307(b) issue (Issue 4, *supra*). These issues are: the ascertainment of community needs (Issue 2, *supra*); and the Section 73.37 issue added by the Review Board.

7. The Commission noted in its designation order that "the applicant has not explained the methodology it used to contact the interviewees, nor has Dowric said which persons contacted are community leaders and which are members of the general public. Therefore, we cannot make a finding that the applicant has sought out and interviewed community leaders representative of the groups existing in the proposed area."

8. The record shows that Genoa W. Martin, vice-president and general manager of Dowric, interviewed the persons Dowric considers community leaders. In selecting such leaders, the following materials were used: a file of presidents of social clubs and fraternal organizations, both black and white, in Brunswick; the telephone yellow pages and city directory; and information supplied by the Brunswick Chamber of Commerce regarding city and county government, other government agencies, schools, civic organizations, etc., in Brunswick and Glynn County. Information prepared by the Coastal Area Planning and Development Commission, a multi-county commission of the State of Georgia, including census data, was also utilized. Since 8,748 of the 19,585 residents of Brunswick are black, and the applicant is especially interested in serving the needs of the black community, about two-

thirds of the original community leaders contacted were black. The following persons were interviewed during this survey:

A. A. Nathan, Judge, Glynn County Juvenile Court (White)
George W. Aycock, Manager, Georgia State Employment Service (White)
Ralph Croft, Mayor, City of Brunswick, Georgia (White)
Earl F. Havgrett, former President Brunswick Junior College; Chairman of Citizen Advisory Committee (White)
William Taylor, Mayor, Darien, Georgia (White)
Harry Owens, Sheriff of Glynn County (White)
Chief A. L. Lokey, Glynn County Police Chief (White)
Chief W. W. Branch, City Police Department (White)
William Crosby, Program Director, City Recreation Dept. (Black)
Mrs. Winnie M. Parrish, Probation Officer, Glynn County (Black)
R. E. Griffin, President, Glynn County Unit of Georgia Teachers Association (Black)
W. A. Baker, Business Manager of Interdenominational Sunday School Council (Black)
The Reverend Julious C. Hope, President, Georgia NAACP (Black)
J. M. Atkinson, Georgia State Employment Service (Black)
The Reverend J. E. Baxtor, Pastor, Grace United Methodist Church (Black)
Alfred Nobles, Jr., Assistant County Agent (Black)
The Reverend E. C. Tillman, Pastor, Shilo Baptist Church; Coastal Area Planning and Development Commission; President, Democratic Club (Black)
C. A. Devillars, Principal, Todd-Grant School, Darien, Georgia (Black)
Miss Lilna E. Parham, President, National Council of Negro Women, Brunswick Branch (Black)
J. S. Wilkerson, Principal, Risley High School (Black)
Charlie Mack, Worshipful Master, Keystone Lodge #98 (Black)
Robert Leggett, Pastor, Emanuel Baptist Church (Black)
Grover W. Pippen, President, Barber's Union (Black)
Mrs. Clarence Tyson, music teacher, civic and religious leader (Black)
Mrs. Daisy Way, teacher, Brookman area (Black)
Mrs. Rosa Seadrow, President, Beautician League (Black)
Mrs. B. B. Palmer, President, Delta Sigma Theta Sorority (Black)
E. F. Parrish, School Administration (Black)
Mrs. Lillian Lane, OEO Director of Glynn County Community Center (Black)

9. Mr. Martin, Mrs. L. B. Johnson (proposed program director), Edward Parrish (proposed part-time Dowric sales department employee), and Mrs. Laverne Cooper (proposed Dowric news director) interviewed approximately 70 members of the general public, of whom approximately 80 percent were black and 20 percent white. An additional 12 members of the general public were interviewed by Martin,

Parrish and Mrs. Johnson during 1971; these interviewees were primarily white persons.

10. As a result of its ascertainment efforts, Dowric found the following to be the needs of the Brunswick area (not listed in any order of priority):

1. Education
2. Teenage problems
3. Anti-poverty fight
4. Civil Rights
5. Better Housing
6. Tax Assessments
7. Religion
8. Air pollution
9. Crime problem
10. Human relations
11. Integration
12. Drugs
13. Preservation of Wild Life
14. Illegitimacy
15. Better drainage facilities
16. Better health education
17. Recreation facilities
18. Sex education
19. Lack of entertainment
20. Better law enforcement
21. More traffic lights
22. Lack of communication between the races
23. Better streets and roads
24. Better schools
25. Flooding
26. More jobs
27. Need for day care centers
28. Juvenile delinquency

11. Dowric proposes the following programs to deal with the needs and problems recited above:

(a) *Community Forum*—round-table discussions with special guests. A one-hour program on Sundays (3–4 p.m.) and frequently on weekdays during the first year.

(b) *Teen talent*—teenage talent and news. A one-hour program on Saturdays (9:30–10:30 a.m.).

(c) *Job Mart*—listing of various job opportunities. A five-minute program on Saturdays (7:30–7:35 a.m.).

(d) *Special Service Reports*—programs dealing with special events, such as elections, celebrity visits, etc.

(e) A daily, five-minute program during which listeners discuss community problems.

(f) News programs every half-hour.

(g) Church services on Sundays (11 a.m.–12 noon).

(h) Public service announcements—220 per week.

The Issue added by the Review Board—Section 73.37

12. In its original application, Dowric requested 1530 kHz, 1kw, D (500 w, CH), non-DA. On September 11, 1972, after the Review Board added an issue to determine whether the proposed Dowric operation's 0.5 mv/m contour would overlap the 0.5 mv/m contour of Station WNMT, Garden City, Georgia, in contravention of Section 73.37(a) of the Commission's rules, Dowric amended to specify 1530 kHz, 1kw, D, DA, and a new transmitter site. Opposition to the amendment was filed and after hearing oral argument, the Presiding Judge granted the petition for leave to amend and accepted the amendment by Order, released September 21, 1972. The amended proposal eliminates any prohibited overlap of the contours of Station WNMT.

Issue 1—Coverage and Availability of Other Services

13. As found in paragraph 5, *supra*, Dowric proposes an operation at Brunswick, Georgia on 1530 kHz with 1kw power (500 w, CH) daytime only, with a directional antenna. Dowric would provide primary service of 0.5 mv/m or greater to 53,893 persons in an area of 1,170 square miles. AM Stations WGIG, Brunswick, WACL, Waycross, Georgia, and WAPE, Jacksonville, Florida, provide primary service of 0.5 mv/m or greater to all of the rural areas proposed to be served, and at least six stations, namely, WMOG, WYNR, WFBF, WLOP, WPDQ and WSAV, serve portions. A minimum of five AM services are available to any portion of the proposed service area.

14. The proposal would provide primary service of 2.0 mv/m or greater to three urban areas, namely, Brunswick, St. Simons (population 5,346) and 95% of Dock Junction (population 6,007), which lies adjacent to Brunswick. AM Stations WGIG, WMOG and WYNR in Brunswick and WAPE, in Jacksonville, Florida, provide primary service of 2.0 mv/m or greater to these areas, and FM Stations WGIG–FM and WYNR–FM in Brunswick provide FM service of 1.0 mv/m or greater thereto.

15. As noted hereinbefore, Integrated proposes a 50kw operation, daytime only, with a directional antenna, on 1530 kHz at Jacksonville, Florida. Integrated would provide primary service of 0.5 mv/m or greater to 647,655 persons in an area of 5,594 square miles. The foregoing population figure includes 140,284 Negroes. AM Stations WAPE and WPDQ in Jacksonville, provide primary service of 0.5 mv/m or greater to all of the rural areas proposed to be served and at least twelve others serve portions. In addition, one FM station (WNDB, Daytona Beach, Florida) provides FM service of 1.0 mv/m or greater to a portion thereof, thus resulting in the availability of at least five aural services to any one portion.

16. Integrated would provide primary service of 2.0 mv/m or greater to three urban areas, namely, Jacksonville, Green Cove Springs (population 3,857) and Macclenny (population 2,733). AM Stations WAPE, WPDQ and WJAX in Jacksonville and WAYR, Orange Park, Florida, provide primary service of 2.0 mv/m or greater to the three communities. In addition, FM Station WJAX–FM in Jacksonville, provides FM service of 1.0 mv/m or greater thereto. Jacksonville, as previously noted, is served by its various local facilities.

Issue 4—The 307(b) Issue—Dowric

17. Brunswick, Georgia, the largest city in Glynn County, has a population of 19,585, and is the county seat of said county (population 50,528). Brunswick and Glynn County had populations of 21,703 and 41,954, respectively, in 1960. Approximately half of the population of Brunswick is black. It lies on the Atlantic coast some 58 miles north of Jacksonville, Florida, outside of any urbanized area. Three standard broadcast stations are authorized in Brunswick, namely, WGIG, 1440 kHz, WMOG, 1490 kHz, both unlimited time stations, and WYNR, 790 kHz, a daytime only station. In addition, two FM broadcast stations operate there, namely, WGIG–FM, 100.7 MHz, and

WYNR–FM, 101.5 MHz. No TV stations are authorized in Brunswick.

18. Glynn County has 463 retail establishments, of which over two-thirds (327) are in Brunswick. Retail sales in the county per year total $59,436,000; about 80% of this total is in Brunswick ($48,023,000). In Brunswick itself are the following retail establishments: 14 lumber and building materials, 10 general merchandise, 61 food stores, 22 automotive dealers, 45 gasoline stations, 35 clothing stores, 25 furniture stores, 41 eating places and 11 drug stores, according to the 1963 Census of Business, Georgia. In addition, the county has 73 manufacturing establishments. Glynn County also has 126 farms, occupying 45,131 acres. Annual value of all farm products sold is $591,716, according to the 1964 Census of Agriculture.

19. As of September 1969, Glynn County had a civilian work force of 20,660, with 551 persons unemployed (2.7 percent unemployment). Major sources of employment in Glynn County are manufacturing, contract construction, trade, government, and services. From 1959 to 1967, employment in manufacturing in Brunswick and its fringe areas, increased by 26 percent; in trade, by 55 percent; in government, by 67 percent; in services and miscellaneous, by 38 percent; and in construction, by 4 percent. The number of persons self-employed, domestics, or unpaid family workers, decreased by 14 percent during the same period.

20. Unemployment is a major problem in the Brunswick area and the unemployment rates are still much greater than either the state or national rates. Educational levels of the unemployed are very low and the majority of the unemployed are unskilled. Contributing to the problem of the unskilled and unemployed labor force is the fact that mobility of this group is negligible and, therefore, "unless some kind of bus service is provided by the employers or by public agencies, the unemployment problem cannot be solved by training programs or hiring practices alone."

21. Education in Glynn County reflects an estimated dropout level of about one-third of the local youth who are leaving school prior to graduation. To counteract the high dropout rate of the youth in Glynn County, Brunswick High School has broadened its curriculum to include a vocational school. Brunswick is also the location of Brunswick Junior College.

22. Highways I–95, U.S. 17, U.S. 25, U.S. 84, Georgia 32, and Georgia 99 pass through Glynn County and form a well-functioning network of highways. The Brunswick area has three airports and is served by two railroads, two bus schedules, sixteen freight lines, and one major airline. In addition, Brunswick has ocean port facilities including 1600 feet of wharf with ironset sheds and a boom gantry to handle bulk facilities.

23. Brunswick has two newspapers—one daily and one weekly. It has one hospital, with approximately 600 beds, that serves Glynn and surrounding counties. Brunswick has a city commission form of government with five commissioners and a city manager. It has its own police and fire department.

Integrated

24. Jacksonville, Florida had a 1970 population of 528,865 and is the county seat of Duval County. Its population in 1960 was 201,030. The city and county boundaries are co-terminous inasmuch as Jacksonville consolidated with Duval County in 1967 and its great population explosion was due mainly to such consolidation. The population of Duval County in 1960 was 455,211. Jacksonville is located on the Atlantic coast near the northern boundary of the state. It is the central city of the Jacksonville Urbanized Area and of the Jacksonville Standard Metropolitan Statistical Area which is comprised of Duval County. Jacksonville also serves as the County Government to Baldwin, Atlantic Beach, Jacksonville Beach and Neptune Beach, which voted to retain their autonomy during the aforesaid consolidation.

25. Since Integrated proposes primarily to serve the black population of the community, the record shows that 121,170 persons, or nearly twenty-three percent of the total population, are non-white. Of this number, over ninety-seven percent are black.

26. Thirteen AM, eight FM (two educational), and four TV (one educational) stations are authorized in Jacksonville, as follows:

AM:
- WAPE, 690 kHz
- WBIX, 1010 kHz
- WERD, 1400 kHz
- WIVY, 1280 kHz
- WJAX, 930 kHz
- WMBR, 1460 kHz
- WOBS, 1360 kHz
- WOZN, 970 kHz
- WPDQ, 600 kHz
- WQIK, 1090 kHz
- WVOJ, 1320 kHz
- WJNJ, 1600 kHz
- WKTZ, 1220 kHz

FM:
- WFAM, 91.1 MHz (Educational)
- WIVY–FM, 102.9 MHz
- WJAX–FM, 95.1 MHz
- WKTZ–FM, 96.1 MHz
- WJCT–FM, 89.9 MHz (Educational)
- WPDQ–FM, 96.9 MHz
- WQIK–FM, 99.1 MHz
- WJNJ–FM, 104.9 MHz

TV:
- WJXT, Ch. 4
- WJCT, Ch. 7 (Educational)
- WTLV, Ch. 12
- WJKS–TV, Ch. 17

An additional AM station is authorized in Orange Park, Florida, namely WAYR, 550 kHz. Orange Park is located in the Jacksonville Urbanized Area.

27. Jacksonville's 135 public schools serve 122,000 students. There are also 7,100 students in 24 parochial schools and 1,300 students in 13 private schools. There are also one public junior college with an enrollment of 19,000 students, and three private colleges with a total enrollment of 5,000 students in Jacksonville.

28. Jacksonville has eight hospitals with 2,031 beds. It has more than 600 churches. It has two daily newspapers, a daily financial newspaper, and a number of area weeklies.

29. Jacksonville has a mayor-council government with 19 council members. It also has an elected sheriff, tax assessor, tax collector, and supervisor of elections. It has a 600-man fire department and a 1100-man police department. Its Welfare Division handles 4,000 cases per

year. Its Department of Child Services handled more than 14,000 cases in 1970.

30. Jacksonville retail sales amounted to $1,048,585,000 in 1970. In 1970, it had a labor force of 222,200, with an unemployment rate of 2.2 percent. In 1960, the labor force was 179,500, with 3.2 percent unemployment. Major sources of employment are agriculture, forestry and fisheries, contract construction, manufacturing, transportation, trade, services, and government. Approximately 75 companies have established major new facilities or had major expansions in Jacksonville since 1960.

31. Jacksonville is served by three railroads, six major airlines with 132 flights daily, 37 motor freight lines, and two bus lines. In terms of total cargo, Jacksonville is the largest port in the South-Atlantic.

ULTIMATE FINDINGS AND CONCLUSIONS

1. This proceeding involves the two mutually exclusive applications of Dowric Broadcasting Company, Inc., seeking a new Class II standard broadcast station at Brunswick, Georgia, on 1530 kHz, utilizing 1 kilowatt power, daytime only, and a directional antenna, and of Integrated Broadcasting Company, Inc., proposing a new Class II station at Jacksonville, Florida, on 1530 kHz, employing 50 kilowatts power, daytime only, and a directional antenna. Neither applicant provides primary service to the community of the other. The issues in this proceeding are a *Suburban* issue and a prohibited overlap issue (Section 73.37) against Dowric, and an areas and populations issue and a Section 307(b) issue regarding both applicants.

2. The findings show that the principals of Dowric have consulted approximately 110 persons in Brunswick and the surrounding service area. Such persons constituted a representative number of community leaders and a cross-section of members of the general public. The problems and needs elicited from such consultations and contacts were assembled and evaluated. After such evaluation, a program format was formulated to accommodate the ascertained problems and needs of the service area. The duration, time and problems to be covered by most of the programs have been shown. Upon the basis of the findings set forth hereinbefore, it is concluded that Dowric has sustained its burden of proof with respect to the ascertainment of community needs issue—Issue Number 2.

3. The findings reveal that the grant of Dowric's petition for leave to amend, filed September 11, 1972, and the acceptance of such amendment by order released September 21, 1972, effectively eliminated any prohibited overlap of the 0.5 mv/m contours of the proposed station and Station WNMT, Garden City, Georgia. Therefore, it is concluded that Dowric has met the Section 73.37 issue added by the Review Board, and the amended proposal protects Station WNMT.

Issue 1—Coverage and Availability of Other Services

4. According to the findings, Dowric would provide service of 0.5 mv/m to 53,893 persons in an area of 1,170 square miles. Three AM stations provide similar service to all of such rural area and at least six AM stations serve portions thereof. There are a minimum of five

AM services in any portion of the proposed service area. Four AM and two FM stations serve the urban areas of Brunswick, St. Simons and Dock Junction in the proposed service area. Brunswick currently has five broadcast stations—three AM and two FM, the latter two being licensed to the holders of AM licenses in the city.

5. Integrated's proposal would provide primary service of 0.5 mv/m to 647,655 persons in an area of 5,594 square miles. Two AM stations provide service to all of the rural area and at least twelve others serve portions thereof. In addition to the eight FM stations in Jacksonville, one FM station in Daytona Beach provides service to portions of said area. Thus, there are at least five aural services available in any one portion. Four AM and one FM stations serve the urban areas of Jacksonville (including the four autonomous communities of Baldwin, Atlantic Beach, Jacksonville Beach and Neptune Beach), Green Cove Springs and Macclenny in the proposed service area. Jacksonville has thirteen AM, eight FM (including two educational), and four TV (one educational) stations. Six of the FM stations are licensed to the holders of AM licenses in the city.

Issue 4—307(b)

6. The decision in this proceeding must be based on Section 307(b) criteria. Such section requires the Commission to "make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." The thrust of Section 307(b) is divided into two prongs—the need of the respective areas for an additional new reception service, and the need of such areas for a new transmission service. The findings reveal that neither applicant would provide service to a "white" or "gray" area. There are no underserved areas within the confines of either proposal and, according to the record, there are a minimum of five aural services available to any portion of either proposed service area. Consequently, it is concluded that on this basis alone neither applicant is entitled to a preference under the reception criteria of Section 307(b) for providing primary service to either Brunswick or Jacksonville.

7. However, notice has been taken of the significant disparity in population to be served by the applicants. Dowric's proposed 0.5 mv/m contour will serve 53,893 in an area of 1,170 square miles. Integrated will provide service to 647,655 persons in an area of 5,594 square miles within its proposed 0.5 mv/m contour. Both applicants propose primarily to serve the black population of their respective areas. The findings reveal that nearly half of Brunswick's 19,585 residents are black, but the record is silent as to the number of such minority groups embraced in the entire service area. Integrated has 140,284 Negroes within its total 647,655 population figure, while 121,170 persons, or approximately twenty-three percent of the population of Jacksonville, are non-white, of which number over ninety-seven percent are black. Such significant disparity simply cannot be overlooked in a case that is as close as the present one. Integrated will serve well over one-half million persons, while Dowric will serve only slightly over 50,000. On

this basis, it is concluded that such disparity has significance and that Integrated is entitled to some preference on this score.

8. With respect to the need of each area for a new transmission service, it has been found that Brunswick has three AM and two FM stations to serve its needs, and that Jacksonville has thirteen AM and eight FM stations to provide service for its needs. This disparity in local transmission facilities is similar to the disparty in the number of persons served, noted above. However, in view of the finding each service area has a minimum of five reception facilities available to any portion of it, this disparity loses some of its importance and must be substantially discounted. The relative need for transmission service is determined primarily by the number of facilities in each community and the populations of those communities. The disparities in facilities and populations have been weighed and it is concluded that the great population disparity overshadows the facility disparity.

9. As noted in paragraph 6, *supra*, Section 307(b) requires a "fair, efficient and equitable distribution" of radio facilities. There can be no doubt that Integrated, with its 50 kw power and over 600,000 persons served, is a much more *efficient* use of the frequency than Dowric's proposal of 1 kw and slightly over 50,000 persons served. Fairness and equity may slightly favor Dowric, but the great disparities in power and population dictate that the Integrated proposal be favored.

10. Accordingly, upon the basis of the entire record in this proceeding, and the foregoing findings and conclusions, it is ultimately concluded that the public interest, convenience and necessity would be served by a grant of the application of Integrated Broadcasting Company, Inc., and a denial of the application of Dowric Broadcasting Company, Inc.

Therefore, IT IS ORDERED that, unless an appeal to the Commission is taken by any of the parties, or the Commission reviews this Initial Decision on its own motion, the application of Integrated Broadcasting Company, Inc., for a construction permit for a new standard radio broadcast station to operate on 1530 kHz with a power of 50 kw, daytime only, utilizing a directional antenna, at Jacksonville, Florida, IS GRANTED, and the application of Dowric Broadcasting Company, Inc., for a facility on the same frequency at Brunswick, Georgia, IS DENIED.

IT IS FURTHER ORDERED that the grant of the application of Integrated Broadcasting Company, Inc. is subject to the following conditions:

> Before program tests are authorized, permittee shall file with the Commission sufficient field intensity measurements made on Station WQIQ, Jacksonville, Fla., to satisfactorily demonstrate that the WQIQ radiation patterns have not changed as a result of permittee's construction. The minimum required measurements made prior and subsequent to said construction shall include at least ten (10) consecutive points for each of the radials included

in the last complete WQIQ proof of performance on file with the Commission. Permittee shall assume responsibility for all costs involved in complying with this condition.

Permittee shall submit data made in accordance with sections 73.48 and 2.579 of the rules for type acceptance of the proposed transmitter.

FEDERAL COMMUNICATIONS COMMISSION,
MILLARD F. FRENCH, *Administrative Law Judge.*

FCC 74-193

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PARTS 2 AND 83—TO MAKE AVAILABLE THE FREQUENCY 157.1 MHz FOR USE BY NONGOVERNMENT SHIP STATIONS; TO REQUIRE THAT 157.1 MHz BE FITTED IN VHF EQUIPMENT FIRST INSTALLED IN SHIP STATIONS AFTER JULY 1, 1974; AND TO DESIGNATE 156.3 MHz FOR SEARCH AND RESCUE COMMUNICATIONS	Docket No. 19946

NOTICE OF PROPOSED RULE MAKING

(Adopted February 27, 1974; Released March 6, 1974)

BY THE COMMISSION:

1. In accordance with a request from the Department of Transportation (U.S. Coast Guard) and as concurred in by the Interdepartment Radio Advisory Committee (IRAC), the Notice of Proposed Rule Making in the above-captioned matter is hereby given.

2. In this Notice of Proposed Rule Making we are proposing amendment of Parts 2 and 83, as follows:

Part 83: (a) to include the frequency 157.1 MHz on a basis such that it will be available to all ship stations authorized by the Commission to employ very high frequencies (VHF); its use will be limited to communications with the United States Coast Guard;

(b) to require, on a mandatory basis, that the frequency 157.1 MHz be available in VHF equipments (transceivers) which are first installed aboard ship [six months from effective date of rule amendment];

(c) to designate 156.3 MHz, in addition to its current usage as the intership safety frequency, as the VHF marine frequency to be used for search and rescue (SAR) communications at the scene of an SAR incident.

Part 2: to reflect in the Table of Frequency Allocations the change in status of the frequency 157.1 MHz from Government to both Government and non-Government and to include the conditions of use applicable there to.

3. Under this proposal, the VHF ship station licensee would be required (see Section 83.106) to fit the frequencies 156.8, 156.3 and 157.1 MHz, one or more working frequencies, and all other frequencies necessary for the service of that vessel. While we are not proposing that 157.1 MHz be installed aboard vessels which are currently fitted with VHF, we anticipate that many of these vessels will install 157.1 MHz because of the added convenience in contacting the U.S. Coast Guard. The frequency 157.1 MHz will be limited in usage to communications with U.S. Coast Guard coast stations or intership with U.S. Coast Guard ship stations. Further, use of 157.1 MHz by vessels

to call and to communicate with the Coast Guard is expected to substantially reduce the number of such communications now being made on 156.8 MHz. While reduction of the loading on 156.8 MHz is highly desirable, we would stress that the Commission is not proposing or amending its rules to permit a ship station to shift its receiver watch from 156.8 MHz to 157.1 MHz. When a Coast Guard station, either ship or coast station, desires to contact a non-Government ship station, the Coast Guard may choose to originate the call on 157.1 MHz, however, if a reply is not received from the called vessel, the Coast Guard will then repeat the call on 156.8 MHz.

4. With regard to the proposed change of 156.3 MHz, under the current rules a distress call is originated on 156.8 MHz and all communications pertinent thereto are then carried out on 156.8 MHz. During the period of such emergency, other calls which are appropriate to 156.8 MHz must be held in abeyance. If, on the other hand, the distress traffic which follows the distress call were shifted to another frequency, the routine use of 156.8 MHz could continue. Accordingly, in order that such an arrangement may be implemented, we are proposing that the intership safety frequency 156.3 MHz be designated, additionally, as the VHF marine frequency for search and rescue (SAR) communications at the scene of an SAR incident.

5. The proposed amendments to the rules, as set forth in this Notice and Appendix, are issued pursuant to authority contained in Sections 4(i) and 303(c), (e), (g) and (r) of the Communications Act of 1934, as amended.

6. Pursuant to applicable procedures set forth in Section 1.415 of the Commission's rules, interested persons may file comments on or before April 12, 1974, and reply comments on or before April 22, 1974. All relevant and timely comments and reply comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision in this proceeding, the Commission may take into account other relevant information before it, in addition to the specific comments invited by this Notice.

7. In accordance with the provisions of Section 1.419 of the Commission's rules, an original and 14 copies of all statements, briefs, or comments filed shall be furnished the Commission. Responses will be available for public inspection during regular business hours in the Commission's Public Reference Room at its headquarters in Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX

Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

A. Part 2, Frequency Allocations and Radio Treaty Matters; General Rules and Regulations.

1. In Section 2.106, the Table of Frequency Allocations is amended to add Footnote "(US ——)" to the band 157.0375–157.1875 MHz to read as follows:

§ 2.106 Table of Frequency Allocations.

Worldwide		Region 2		United States		Federal Communications Commission				
Band (MHz)	Service	Band (MHz)	Service	Band (MHz)	Allocation	Band (MHz)	Service	Class of station	Frequency (MHz)	Nature of services of stations
*		*		*		*		*		*
				157.0375–157.1875 US ___	G.	----------			157.100	US Coast Guard Liaison Frequency.
*		*		*		*		*		*

2. In Section 2.106, Footnote US —— is added in numerical order to the subparagraph "U.S. Footnotes," to read as follows:

US —— The frequency 157.100 MHz is the primary frequency for liaison communications between ship stations and stations of the United States Coast Guard.

B. Part 83, Stations on Shipboard in the Maritime Services.

1. In Section 83.106(b), subparagraph (b)(3), (b)(4) and (b)(5) are designated (b)(4), (b)(5) and (b)(6), respectively; a new subparagraph (b)(3) is added; and the note following (b)(6) is deleted, to read as follows:

§ 83.106 Required frequencies for radio telephony.

* * * * * * *

(b) Each ship station equipped with radiotelephony to work in the authorized bands between 156 and 162 MHz shall be able to transmit and receive Class F3 emission on:

(1) The Distress, Safety and Calling frequency 156.800 MHz;

(2) The primary Intership Safety frequency 156.300 MHz;

(3) The primary frequency for liaison communication with the United States Coast Guard, 157.100 MHz;

(4) One or more working frequencies; and

(5) All other frequencies necessary for its service;

(6) Exceptionally, however, single or dual channel equipment which otherwise conforms to the technical requirements of this part, may be used solely for navigational communications on a ship's bridge, on a frequency designated for such navigational purposes, in those cases where such ships have no requirement for other VHF communications.

2. In Section 83.351, paragraph (a) is amended to add condition of use (73) opposite 156.300 MHz and to insert the frequency 157.100 MHz and associated particulars; and paragraph (b) is amended to add subparagraphs (6) and (73), to read as follows:

§ 83.351 Frequencies available.

(a) * * *.

Carrier frequency (kHz)	See section	Conditions of use
(MHz)		
* * *	* * *	* *
156.300	83.106, 83.359	34, 40, 44, 34.
* * *	* * *	* *
157.100	83.106, 83.359	6, 33, 40, 41.
* * *	* * *	* *

(b) * * *.

* * * * * * *

(6) Limited to communication with ship stations, aircraft stations, or coast stations, all of which are operated by the United States Coast Guard.

* * * * * * *

(34) The frequency 156.300 MHz is also available for use by ship stations for search and rescue (SAR) communications at the scene of an SAR incident. When control of the scene of action of an SAR incident is under the control of a coast station of the United States Coast Guard, 156.300 MHz may be employed by ship stations to communicate with that control station.

3. Section 83.359 is amended to read as follows:

§ 83.359 Frequencies in the band 156–162 MHz available for assignment.

The frequencies listed in the following table are available for assignment to stations as indicated. Except as provided in § 83.351 (b)(24) and (b)(55), these frequencies are not authorized for communication with stations on board aircraft. The limitations applicable to the respective frequencies are set forth in § 83.351 (a) and (b).

Channel designator	Frequency (MHz)		Points of communication
	Ship	Coast	
Distress, Safety, and Calling			
*	*	*	* * * * *
Intership Safety			
06	156.300	156.300	(a) Intership and search and rescue (SAR) at the scene of an SAR incident.
Port Operations			
*	*	*	* * * * *
Navigational			
*	*	*	* * * * *
Liaison U.S. Coast Guard			
22	157.100	157.100	Ship, aircraft and coast stations of the U.S. Coast Guard.
Environmental			
*	*	*	* * * * *
State Control			
*	*	*	* * * * *
Commercial			
*	*	*	* * * * *
Noncommercial			
*	*	*	* * * * *
Public Correspondence			
*	*	*	* * * * *

FCC 74R–82

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
HENDERSON BROADCASTING CO., INC., BLOOMINGTON, IND.	Docket No. 19813 File No. BPH–7946
INDIANA COMMUNICATIONS, INC., BLOOMINGTON, IND.	Docket No. 19814 File No. BPH–8030
BLOOMINGTON MEDIA CORP., BLOOMINGTON, IND.	Docket No. 19815 File No. BPH–8032
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted March 6, 1974; Released March 11, 1974)

BY THE REVIEW BOARD: BOARD MEMBER BERKEMEYER DISSENTING IN PART AND VOTING TO ADD A SECTION 1.65 AND 1.514 ISSUE ON A COMPARATIVE BASIS, AND TO ADD SUBURBAN ISSUE IN BOTH INSTANCES.

1. The mutually exclusive applications of Henderson Broadcasting Co., Inc. (Henderson), Indiana Communications, Inc. (Indiana) and Bloomington Media Corporation (Bloomington) for a construction permit for a new FM broadcast station in Bloomington, Indiana, were designated for hearing by Commission Order, FCC 73–929, 38 FR 26406, published September 12, 1973. Now before the Review Board is a motion to enlarge issues, filed October 5, 1973, by Bloomington,[1] requesting the addition of Rule 1.65/1.514, financial, and *Suburban* issues against Indiana, and *inter alia*, staffing, *Suburban*, and misrepresentation issues against Henderson.[2]

ISSUES CONCERNING INDIANA

Rule 1.65/1.514 Issues

2. Bloomington's request for 1.514, 1.65 and misrepresentation issues is based on the alleged failure of Indiana to report in its application,

[1] Also before the Board are the following related pleadings: supplement, filed October 10, 1973, by Bloomington; comments, filed November 15, 1973 and November 16, 1973, by the Broadcast Bureau; opposition, filed November 16, 1973, by Indiana; opposition, filed November 16, 1973, by Henderson; and replies, filed December 7, 1973, by Bloomington. In addition, the Board has before it a petition to enlarge issues, filed October 5, 1973, by Indiana; opposition, filed November 15, 1973, by the Broadcast Bureau; and an opposition, filed November 16, 1973, by Henderson. Since this petition requests a studio location issue identical to that requested by Bloomington, the two petitions will be considered together. But see footnote 2, *infra*.

[2] In its motion, Bloomington also requests inquiries into Henderson's studio location, estimated construction costs, financial proposals, tower height and location, and studio site availability. These requests have been mooted, however, by an amendment to the Henderson application accepted by Memorandum Opinion and Order of the presiding Administrative Law Judge (FCC 74M–46), released January 11, 1974. The amendment includes a new financial plan showing increased construction costs and additional available funds, a change in the proposed studio location, and amended engineering data involving a change in the proposed tower location.

104–029—74——3

or subsequently, that Robert M. Petranoff, a board member and five percent shareholder in Indiana, is a three percent share holder in Monroe Channel Cable Vision, Inc. (Monroe), operator of the only cable system in Bloomington, and was also, prior to February, 1968, a director and vice-president of Monroe. Since the ownership of CATV systems is an interest in media of mass communications for purposes of the comparative issue, Bloomington asserts, citing *Lake Erie Broadcasting Company*, 34 FCC 2d 354, 24 RR 2d 64 (1973); *Media Inc.*, 22 FCC 2d 875, 18 RR 2d 1175 (1970); and *Resort Broadcasting Co., Inc.*, 41 FCC 2d 640, 27 RR 2d 1379 (1973), Indiana was obligated to report Petranoff's connection with Monroe in its application. The Broadcast Bureau supports Bloomington's position but maintains that a separate misrepresentation issue is not necessary, since the impact of Indiana's conduct on its basic or comparative qualifications can be explored fully in the context of a 1.65/1.514 issue.

3. Indiana in opposition, contends that FCC Form 301 requires only the reporting of business or financial enterprises in which an applicant now or within the past five years has had either a 25% or greater interest or an official relationship. Petranoff's ownership of a 3% interest in Monroe does not meet this standard, Indiana asserts, and his official relationship with the corporation ended on April 25, 1967, more than five years before the filing of Indiana's application on August 3, 1972. While conceding that CATV interests might be relevant to a diversity of control inquiry under other circumstances, Indiana argues that Petranoff's interest here is too small to be of decisional significance. In reply, Bloomington disputes the contention that Petranoff has had no official relationship with Monroe during the last five years and offers in support a copy of Monroe's annual report to the Secretary of State of Indiana, filed July 29, 1967, which lists Robert M. Petranoff as director and vice-president with a term expiring on February 8, 1968.

4. The Review Board will deny this portion of Bloomington's request. All of the cases cited by Bloomington concern failures to report significant stock holdings in and/or current official positions with CATV systems. Here, in contrast, an applicant has failed to report that a five percent shareholder owns a three percent interest in a CATV system and that four and one-half years prior to the filing of its application he also held a directorship in that system. While we agree with Bloomington that Petranoff's CATV interests should have been reported in the interest of full disclosure, we must conclude that the interests themselves are too small and insignificant to justify the addition of the requested issues.

Financial Issue

5. Bloomington supports its requested financial issue with allegations that Indiana has both understated its cost estimates and overstated the funds available to meet them. Indiana's amended cost estimate of $208,893.67 fails to include furnishing costs of $9,000.00, Bloomington asserts, making its actual construction and first year operation costs $217,893.67. To meet these costs, petitioner contends, Indiana reports that it has available funds totalling $209,174.43. In truth, however, Indiana will have available only $162,603.00, according to Blooming-

ton, since Indiana has erroneously included funds already contributed by its shareholders and funds from unsupported loans in its calculations. With regard to the former funds, Bloomington alleges that $2,400 which has already been paid into Indiana by its shareholders must be subtracted from its estimate of available funds since its financial proposal reflects no existing capital. With regard to the latter funds, petitioner claims that bank commitment letters furnished by three of Indiana's principals fail to specify the terms of repayment, collateral required and rate of interest and thus cannot be relied upon by the applicant.

6. Indiana, in opposition, argues that Bloomington has misinterpreted the figures reported in its application. The $9,000 allowance for furnishings was not omitted from its amended application, it claims, but was merely reported there in a manner different from that used in a May 18, 1973 amendment to one of its exhibits. While "furnishings" are listed separately in one account and included under "other miscellaneous" costs in the other, both accounts include this expense, Indiana maintains, making it unnecessary to increase its estimated expenses by $9,000 as Bloomington proposes. Bloomington's assessment of its available funds is equally erroneous according to Indiana. The $2,400 already received by the corporation from its shareholders is reported under "donations" in its application, it submits, but costs which have already been paid are included in its estimated expenses as well, so that one category balances the other. And, contrary to Bloomington's assertion, Indiana continues, under *Western Communications Inc.*, 39 FCC 2d 1077, 26 RR 2d 1456 (1973), it is permitted to rely upon bank commitments to its shareholders, even though the terms of the loans have not been specified. The Bureau supports Indiana's position, and adds that the personal balance sheets of the three shareholders in question do not indicate that the bank commitments are unreasonable.

7. In reply, Bloomington asserts that Indiana has not specified how and when the funds contributed by its shareholders were spent and has therefore failed to substantiate its claim that these contributions are balanced by already-paid expenses. Further, Bloomington maintains, Indiana's alleged contingency fund does not constitute a financial cushion upon which it can rely, since a portion of its excess funds has already been allocated for FCC fees and a significant portion of the remainder will have to be used to meet the legal costs of a three-party comparative hearing.

8. The Review Board will not add the requested financial issue. Indiana's decision to report both paid-in funds and already-paid expenses in its financial statement is entirely proper, we believe,[3] and its reliance on bank commitments with indefinite terms is justified by the fact that the commitments run to its shareholders rather than to the applicant itself. See *Western Communications, Inc., supra.* We also find Indiana's account of the reporting of its furnishing costs convincing.

[3] Contrary to Bloomington's contention, an applicant has no obligation to spend its funds as soon as they are received. Thus Indiana need not balance the $2,400 contributed by its shareholders with $2,400 in already-paid expenses, so long as it balances its total estimated costs and total available funds by including in its financial statement past transactions in both categories.

Indiana's amended exhibit of May 18, 1973, lists expenses for "other items" of $37,710, including $9,000 for furnishings. The fact that its amended application also includes a list of expenditures for "other items" and the fact that these expenditures cover the same categories as those found in the amended exhibit (such as legal and engineering costs) and total the same amount suggest to us that the two lists are identical and that the expenditures for furnishings included in one list are therefore included in the other as well. Under these circumstances, we must conclude that Indiana's financial report is accurate and that Bloomington's requested issues are unwarranted.[4]

Suburban Issue

9. Indiana's ascertainment study is deficient, petitioner urges, in two major respects; thus Bloomington claims that Indiana has failed to ascertain the needs and interests of significant groups and elements of the community and that its interviews, compilations of community problems and proposed programming focus on program tastes rather than community problems. As evidence of the former deficiency, Bloomington submits that Indiana has not interviewed Jewish or Roman Catholic clergymen, representatives of the cultural elements of the community, and feminist leaders.[5] As evidence of the latter, Bloomington cites the following characteristics of Indiana's study: (1) only one of the five questions asked community leaders relates to community problems;[6] (2) only one of the questions asked members of the general public relates to community problems;[7] (3) only three and one-half pages of Indiana's fourteen page summary of community problems are devoted to community problems as opposed to radio ownership and programming considerations; (4) Indiana's list of community problems includes more-accurately characterized program needs such as "concerned news" and a type of music now unavailable locally; and (5) Indiana's program proposals correspond to the categories of program preferences identified in its survey.

10. Indiana, in opposition, maintains that its survey does not omit religious, cultural, and feminist elements of the community. Rather, it claims, the religious community is represented by an interview with a member of the Monroe County United Ministries,[8] the cultural community by interviews with officials and students at Indiana University, the largest and most important cultural center in Bloomington, and women's groups by interviews with nine female community leaders

[4] Bloomington's allegation that Indiana has no clearly-characterized contingency fund does not alter our conclusion. However, its particular cost estimates are characterized, the fact remains that Indiana's amended application shows available funds in excess of estimated expenses.

[5] Indiana's failure to consult with leaders of feminist groups is reflected by the fact that all of the women interviewed discussed traffic, parking, housing and similar issues rather than women's rights, Bloomington asserts.

[6] The remaining four questions allegedly deal with the problems and goals of the leaders' organizations, the extent to which radio can further these goals, and the extent to which radio can help solve general community problems.

[7] The other questions deal with radio ownership, listening habits, program preferences, and news sources, according to Bloomington.

[8] While admitting that the representative from the Monroe County United Ministries is not Jewish or Roman Catholic, Indiana maintains that it is not required to interview clergymen of all faiths. Further, Indiana contends that the Jewish community of Bloomington is quite small and that recent interviews with Jewish and Roman Catholic clergymen identified no new community problems.

and 264 female members of the general public.[9] As for the scope of its survey, the fact that it solicited information concerning listening habits and program preferences should not detract from the fact that it also succeeded in identifying community needs and problems, Indiana asserts. The Bureau also opposes Bloomington's request, arguing that petitioner has submitted no evidence as to the existence, nature, size, and significance to the community of Jewish, Roman Catholic, cultural, and women's rights groups and has not demonstrated that Indiana failed to identify community needs and problems or failed to propose appropriate programs for meeting these needs.

11. Bloomington in reply argues that the burden of producing evidence as to the existence, nature, size and significance of various community groups should be placed on Indiana and not on it. Even so, it continues, there is no dispute as to the importance of cultural interests in the community since all three applications contain chamber of commerce studies and survey data emphasizing the variety of cultural activities available in Bloomington. Indiana's interviews with University officials and students, none of whom mentioned cultural events or concerns, cannot be said to represent these interests adequately, Bloomington submits.

12. The Review Board does not believe that a *Suburban* issue against Indiana is justified. In the absence of evidence showing significant Jewish and Roman Catholic populations in Bloomington, we cannot conclude that Indiana's survey of religious groups is inadequate. Likewise we cannot assume that Indiana has ignored a significant group of women, in view of the large representation of women found in its survey as a whole. In the same manner, petitioner's failure to identify a separate and distinct cultural "group" within the community makes it impossible for us to fault Indiana for omitting the cultural elements of Bloomington. Finally, we cannot accept petitioner's contention that an applicant should not inquire into the program preferences of the community it proposes to serve. So long as its survey solicits information on community needs and problems, and petitioner has offered no evidence that Indiana's survey fails to meet this standard, an applicant is free to seek any other data it considers helpful at the same time.

ISSUES CONCERNING HENDERSON

Staffing

13. Bloomington requests inquiries into the employment commitments of Bayard H. Walters, president and principal of Henderson, and his wife, Ann Walters; the effects of these commitments on Henderson's staffing, integration, and financial proposals; and possible Section 1.65 and/or 1.514 violations by Henderson with respect to these matters. Bloomington's request is based on the following undisputed facts: (1) Bayard H. Walters is the permittee of standard broadcast station WKCM in Hawesville, Kentucky; (2) Walters was awarded a construction permit for this station in an Initial Decision released November 18, 1971 (FCC 71D–92) and began broadcasting

[9] The large number of women it interviewed demonstrates a desire on its part to seek out the views of women, Indiana maintains.

on November 7, 1972; (3) in his construction permit application for the Hawesville, Kentucky station, Walters stated that he would be its full-time general manager and would also serve as its first class engineer; (4) Walters and his wife both work at WKCM at the present time; (5) Henderson's application states that Walters will be general manager and sales manager of its proposed station and that Ann Walters, his wife, will also be a full-time employee; (6) Hawesville, Kentucky and Bloomington, Indiana are more than 100 miles apart. Nowhere in Henderson's application is it disclosed that Bayard Walters, its proposed full-time general manager and sales manager, has committed himself to serve as a full-time employee of WKCM or that Ann Walters, also a proposed full-time employee of Henderson, is now working at WKCM as well, Bloomington contends. Further, since it is clear that the Walterses cannot honor both their obligations to WKCM and their obligations to Henderson, petitioner continues, inquiries into Henderson's proposed staffing arrangements are necessary. Finally, Bloomington alleges that Henderson's failure to disclose Walters' relationship with the Hawesville, Kentucky station raises serious questions concerning its compliance with Sections 1.65 and/or 1.514 of the Commission's Rules and its basic qualifications to be a licensee of the Commission.

14. Henderson in opposition argues that it informed the Commission of Walters' position with WKCM in an October 27, 1972, amendment to its application, and in addition, submits Walters' affidavit describing his relations with WKCM and Henderson. According to Walters, he has concluded on the basis of his experience with WKCM that several years will elapse before a construction permit is granted for the Bloomington station. During this period Walters maintains that he will operate WKCM and act as its full-time general manager. Should the Henderson application be granted, Walters states that he will become the full-time general manager of the new station, and will hire a station manager to supervise WKCM on a full-time basis.[10] His commitment to serve as full-time general manager of WKCM was not intended as a life-time job, Walters claims. The Broadcast Bureau also argues that the WKCM and Henderson applications are not inconsistent since Walters did not represent that he would be general manager of WKCM in perpetuity, and notes that the Henderson application does disclose that Walters is president of WKCM. While expressing concern with Walters' readiness to change his plans toward WKCM, the Bureau suggests that the weight to be given his commitment to the proposed new station can be determined under the standard comparative issue. In reply, Bloomington argues that Walters' statement must be placed in the proper perspective. The Henderson application was filed five months before WKCM went on the air, Bloomington alleges, so that Walters had committed himself to give up his full-time employment at WKCM before the station even began to operate. Bloomington also rejects the contention that Walters' obligations to the two stations do not conflict but represent instead alternative com-

[10] In his affidavit, Walters states that he had anticipated gross revenues of $35,000 to $40,000 during WKCM's first full year of operation; instead, gross revenues for the first year should total approximately $100,000. These figures, Walters suggests, establish that sufficient funds will be available to hire a full-time station manager for WKCM.

mitments whereby Walters will stop serving as general manager of WKCM only if Henderson's application is granted, citing *Payne of Virginia, Inc.*, 28 FCC 2d 66, 21 RR 2d 535 (1971).

15. The Review Board will not add the requested issues. Henderson's October 27, 1972, amendment to its application informing the Commission of Walters' position with WKCM refutes Bloomington's argument that it has concealed or misrepresented information. Specific inquiries into Henderson's staffing arrangements are unnecessary as well, since the impact of Walters' present position on his commitment to the proposed new station can be explored under the standard comparative issue. Finally, Bloomington's reliance on *Payne of Virginia, Inc., supra*, is misplaced. In that case, an applicant failed to report that one of its principals had a conflicting obligation to another proposed station. Here, however, Henderson has disclosed both of Walters' broadcast interests and the two do not, on their face, conflict.

Suburban Issue

16. Bloomington contends that Henderson's ascertainment survey is inadequate in that it omits leaders of significant community groups and does not include a sufficient number of representatives from groups not associated with Indiana University. Further, petitioner contends that Henderson's proposed programs are not related to the problems identified in its survey. In support of its first contention, Bloomington charges that representatives of Jewish, Roman Catholic, cultural, feminist, and eleemosynary groups within the community are not included in Henderson's survey and that only 22 of the 34 leaders interviewed have no connection with the University. As a result of this small sample, Bloomington argues, some significant groups, of necessity, are left out of the study entirely and others, such as labor, blacks, non-university education, and religion, are covered by only one interview. In support of its second contention, Bloomington alleges that Henderson's proposed programs meet only three of the twelve community problems identified in its survey. The remaining program proposals are either unrelated to the ascertained problems or related by vague, general references Bloomington maintains.[11]

17. In opposition, Henderson argues that its community survey reflects an awareness of its proposed service areas, that its contacts with community leaders indicate a good-faith effort on its part to determine the needs and interests of the community, and that its proposed programs are responsive to these needs and interests. The Bureau also opposes Bloomington's request and alleges that petitioner has submitted no evidence in support of its claim that significant groups are omitted or underrepresented in Henderson's survey and has provided only a superficial analysis of Henderson's programming proposals. Bloomington, in reply, claims that the Jewish community of Bloomington includes fifty to seventy-five families and at least two hundred fifty students, that the Catholic community numbers approxi-

[11] As an example of a vague, general reference, Bloomington cites Henderson's proposed "Hotline" program, a nightly telephone talk show which the applicant states will focus "approximately three or four nights on County wide and State/National issues, two or three nights on Bloomington issues, and one or two nights on Campus issues."

mately 8,868 persons,[12] and that the importance of cultural events in the community has been recognized by all three applicants. In view of the significance of these three groups and in view of Henderson's failure to consult any of their leaders, the addition of a *Suburban* issue against Henderson is warranted, Bloomington concludes.

18. Because Bloomington has failed to demonstrate that the community's religious groups are not represented in Henderson's survey,[13] has failed to identify a separate and distinct cultural "group" within the community, and has failed to provide evidence of significant groups which have been either omitted or underrepresented, the Review Board cannot conclude that the survey is inadequate or deficient. At the same time, we must reject Bloomington's claims concerning Henderson's proposed programming. A review of its application shows that Henderson proposes programs devoted to at least five specific community problems, a nightly talk program devoted to local and national affairs, editorials by station employees and area residents, and announcements of local news and events. We consider these proposals to be responsive to the ascertained needs of the community, and therefore will not add the requested *Suburban* issue.

Misrepresentation of Construction Costs [14]

19. Henderson's estimated construction costs do not fall within an acceptable range of reasonableness, Bloomington asserts. In a September 5, 1973, amendment to its application, Henderson proposes to construct its entire antenna system for $16,732. However, according to Bloomington's consulting electronics engineer, a tower of the type planned by Henderson would cost approximately $40,000 to build.[15] In view of this discrepancy of over $23,000, a misrepresentation issue against Henderson is warranted, Bloomington argues. Henderson, in opposition, asserts that its amendment includes a firm commitment from its proposed supplier to provide and install all necessary equipment. Bloomington's cost estimates are irrelevant to this commitment, Henderson urges. The Bureau, while supporting Bloomington's contention that Henderson has understated its construction costs, maintains that there is no evidence of any attempt to deceive the Commission. The Review Board agrees with the Bureau that there is no evidence of misrepresentation on Henderson's part. Moreover, our review of Henderson's application convinces us that its estimated construction costs are based on the commitment of its supplier. Under these

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[12] Bloomington's data on the Jewish community is taken from Indiana's opposition to its motion to enlarge issues; the data on the Catholic community was obtained in interviews with two local priests.

[13] Henderson's survey of community leaders shows interviews with two clergymen.

[14] As noted in footnote 2, *supra*, in view of Henderson's new financial plan, the requested financial issue is limited to consideration of alleged misrepresentation with respect to a single cost estimate.

[15] The $40,000 estimate is contained in a sworn statement by Bloomington's consulting engineer and is based on estimates received by him from two tower suppliers plus his own research into manufacturers' catalogues.

circumstances, the addition of a misrepresentation issue would be inappropriate.

20. Accordingly, IT IS ORDERED, That the petition to enlarge issues, filed October 5, 1973, by Indiana Communications, Inc. and the motion to enlarge issues, filed October 5, 1973, by Bloomington Media Corporation ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74D-2

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of CHARLES W. HOLT, TALLAHASSEE, FLA.	Docket No. 19445 File No. BP-18189
B. F. J. TIMM, TALLAHASSEE, FLA. For Construction Permits	Docket No. 19447 File No. BP-18487

APPEARANCES

W. Ervin James (Hofheinz & James) and *Benedict P. Cottone* and *David Meyers* (Law Offices of Benedict P. Cottone) on behalf of Charles W. Holt; *Edward P. Taptich* and *John L. Tierney* (McKenna, Wilkinson & Kittner) on behalf of Talquin Broadcasting Company; *James K. Edmundson* and *Donald E. Ward* (Fly, Shuebruk, Blume & Gaguine) on behalf of B. F. J. Timm; and *Robert B. Nelson* and *William D. Silva* on behalf of Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE
FOREST L. MCCLENNING

(Issued January 15, 1974; Effective March 11, 1974 Pursuant to Section 1.276 of the Commission's Rules)

PRELIMINARY STATEMENT

1. By order released February 24, 1972, the Commission designated for hearing in a consolidated proceeding the mutually exclusive applications of Charles W. Holt (hereinafter Holt), of Talquin Broadcasting Company (hereinafter Talquin), and of B. F. J. Timm (hereinafter Timm) each for authority to construct a new standard broadcast station on the facilities 1070 kHz, with 10 kilowatts power, daytime only. Talquin proposed to operate at Quincy, Florida, Holt and Timm at Tallahassee, Florida. Hearing was ordered upon the following issues:

> 1. To determine the areas and populations which would receive primary service from the applicants and the availability of other primary aural service (1 mv/m or greater in the case of FM) to such areas and populations.
>
> 2. To determine the efforts made by Charles W. Holt and Talquin Broadcasting Company to ascertain the community needs and interests of the areas to be served and the means by which the applicant proposes to meet those needs and interests.

3. To determine whether the proposal of B. F. J. Timm is in compliance with section 73.24(g) of the Commission's rules concerning population within the 1000 mv/m contour, and, if not, whether circumstances exist which would warrant a waiver of said section.

4. To determine, in light of section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.

5. To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to section 307(b), which of the operations proposed in the above-captioned applications would, on a comparative basis, best serve the public interest.

6. To determine, in light of the evidence adduced pursuant to the foregoing issues, which, if any, of the applications should be granted.

2. By order released December 15, 1972, the following issue was added: To determine whether Charles W. Holt has failed to comply with the provisions of sections 1.514 and/or 1.65 of the Commission's rules and regulations, and, if so, to determine the effects of such noncompliance on the applicant's basic or comparative qualifications to be a broadcast licensee.

3. July 31, 1973, applicants Timm and Talquin tendered a Joint Petition for Approval of Agreement looking toward the dismissal of Talquin's application for Quincy under the terms of an agreement calling for the reimbursement of Talquin's expenses reasonably and prudently expended in the preparation and prosecution of its application. By order released August 24, 1973, the Presiding Officer ordered Talquin to comply with the provisions of section 1.525(b)(2) of the Commission's rules, giving local notice of the proposed withdrawal of Talquin's application and affording further opportunity for other persons to apply for the facilities specified therein. Such notice was duly published and proof of publication was accepted by order released October 12, 1973. No competing application was filed within the period specified in section 1.525 of the Commission's rules and the joint petition otherwise conforming with the requirements of section 1.525 of the rules, the application of Talquin Broadcasting Company was dismissed and the applications of Holt and Timm retained in hearing status by order released October 23, 1973.

4. October 29, 1973, Holt filed a Motion to Dismiss Application contingent upon grant of a simultaneously filed Joint Petition for Approval of Agreement looking toward the dismissal of Holt's application in return for reimbursement of expenses reasonably and prudently expended in the preparation and prosecution of Holt's application. In addition to the usual showing under section 1.525(a) of the rules, the petitioners also addressed themselves to Holt's qualifications to receive reimbursement under the designated issues. By a response filed November 13, 1973, the Broadcast Bureau acknowledged that the joint petition and supporting papers conformed with the

general requirements of section 1.525 but raised a question regarding Timm's ability to fund the Talquin and Holt dismissal agreements and still have sufficient resources to construct and operate his proposed station for one year without reliance on revenues. December 5, 1973, Timm sought leave to amend his application to update his financial qualifications. At the further hearing conference on December 12, 1973, the Bureau indicated that it had no objections to acceptance of the amendment and that on the basis of the data contained therein it does not now question Timm's ability to fund the dismissal agreements and still remain financially qualified to construct and operate his proposed station. The petition and amendment being addressed to newly raised matters, good cause is present for grant. The petition, therefore, will be granted, the amendment tendered therewith accepted and the amendment, together with the Joint Petition for Approval of Agreement and data submitted therewith, incorporated by reference into the record.

5. November 7, 1973, the Bureau filed a petition requesting that further issues of a disqualifying nature be specified against Holt. In view of this pending petition and the potentially disqualifying section 1.65 issue already specified against Holt, the Bureau opposed reimbursement absent favorable resolution of the 1.65 issue and any issue added by the Review Board as a result of the Bureau's petition to enlarge. At the December 12, 1973, hearing conference, the Bureau expressed its view that insofar as the present section 1.65 issue was concerned that the evidence adduced on this issue "is not sufficient to warrant disqualification" of Holt to receive reimbursement. In its reply filed December 14, 1973, the Bureau withdrew its petition to enlarge the issues, having been satisfied by the factual recitals in Holt's opposition pleading that the further issues of a disqualifying nature need not be specified. By order of December 26, 1973, the petition to enlarge issues was dismissed.

6. A prehearing conference was held April 4, 1972. Hearing sessions or conferences were conducted July 24–28, 1972, November 8–10, 1972, November 13, 1972, January 17, April 23, May 30, July 2, 27, and 31, October 17, and December 12, 1973. Proposed Findings of Fact and Conclusions of Law were filed by Timm December 18, 1973. Holt filed a statement in lieu of Proposed Findings of Fact and Conclusions of Law December 21, 1973, in effect adopting those of Timm. Pursuant to agreement of the parties, the Bureau did not file Proposed Findings of Fact and Conclusions of Law, but reserved the right to file Reply Findings and Conclusions. December 26, 1973, it orally advised the parties and Presiding Officer that no Reply Findings and Conclusions would be filed. The instant decision, in substance, adopts the Proposed Findings of Fact and Conclusions of Law filed by Timm.

FINDINGS OF FACT

7. *The Section 1.65 Issue.* Holt filed his application May 7, 1968, and it was not until February of 1969 that the conflicting applications of Talquin and Timm were filed. In Section II, Table II of his application, Holt listed all of his existing and previous broadcast interests and

official relationships. In addition, in Exhibit I to his application, Holt listed all of his "Investments" as of April 15, 1968, not only in the broadcast stations but in 36 other business enterprises including Southern National Bank of Hattiesburg (1,068 shares), Air Enterprises, Inc. (described as a "Radio Sales Co."), and Donovan Lane, Inc. (described as "Men's Wear") (BP–18189).[1] By prehearing amendment, Holt submitted an updated list of investments, including "Investments in Broadcasting Affiliates" and "Other Investments" as of November 17, 1971. Holt Development Corporation and Air Enterprises, Inc. were listed among the broadcasting affiliates while Southern National Bank in Hattiesburg (1,568 shares) and Donovan Lane, Inc. appeared in the "Other" category.[2]

8. After designation for hearing, Holt through counsel, exchanged a biographical exhibit on July 3, 1972, in which he again recited his broadcast station ownerships and connections. Holt reiterated that he was the "controlling stockholder of Holt Development Corporation, an investment company, . . ." He also stated that he controlled "Air Enterprises, Inc., a program production and service company . . ." and that he was "one of the organizers and stockholders of Southern National Bank in Hattiesburg and serve(d) on its Board of Directors."

9. July 12, 1972, the Broadcast Bureau filed a Petition to Enlarge Issues, alleging that Holt's biographical exhibit indicated that Holt had interests and connections in the aforementioned three companies which were not disclosed in his application. Holt did not oppose this petition but on July 25, 1972, filed a Motion to Amend his application to show his official connections and stock interests in the Southern National Bank (5%) and Donovan Lane Clothing Store (6%) plus Nylonate Paint Company (less than 1%), and Happy Products Toy Company (about 7⅛%).[3] The amendment, which reflected that his interests in the last two companies had been acquired after the filing of his application, was granted by order released August 15, 1972.

10. Notwithstanding that the Bureau's petition had not been acted upon, Holt offered and agreed at the hearing to the adduction of evidence on the issue requested in the Bureau's pleading as if it had been granted. Such evidence was received by way of *voir dire* on the biographical statement and direct and cross-examination of Mr. Holt. After the requested issue was added, the written "Further Testimony of Charles W. Holt" as requested by Bureau counsel, was received in evidence by stipulation.

11. Holt testified that when his application was filed on May 7, 1968, he had no reason to believe that any conflicting application would be filed. His ownership interests in Air Enterprises, Inc., Southern National Bank, and Donovan Lane, Inc. were shown in Exhibit I of the application but his connections as officer and director were not listed in Table II. He showed no ownership or official connection with Holt Development Corporation in the application as originally filed because

[1] Holt's broadcast stations were segregated from his general investments. Air Enterprises, Inc. was grouped with the stations.
[2] The amendment also reflects that Holt controlled Holt Development Corporation.
[3] The Bureau supplemented its petition to include the business interests allegedly first disclosed by this amendment.

that company was then and for several years afterwards only a paper corporation. About 2% of the functions of Air Enterprises, Inc. consists of originating sports broadcasts released to other stations by arranging interconnection. This is done on a per game basis without time options or other control of station time. The bulk of the activities of Air Enterprises, Inc. consists of servicing the administrative affairs of the Holt radio stations in Hattiesburg and McComb, Mississippi, and in Montgomery, Alabama.

12. Holt stated that the failure to list the omitted business connections in Table II was due to a misinterpretation. It was not until he came to Washington in July 1972, to testify in the hearing that he became aware that nonbroadcast connections was a matter which could be relevant to a comparison with the competing applicants. It never occurred to Holt that his connections with the omitted businesses could in any way be detrimental to the success of his application. Rather he thought, if anything, they would be helpful. There could therefore have been no purpose in his mind for concealment of the full extent of such connections.

13. *Blanketing Issue.* In its designation order, the Commission pointed that Timm had estimated that 1,101 persons resided within his proposed 1 v/m blanketing contour. Since that number exceeded 300 or 1% of the population within his proposed 25 mv/m contour, the Commission specified an issue to determine whether Timm would comply with section 73.24(g) of the rules, and if not, whether the public interest would be served by a waiver. Section 73.24 provides in pertinent part as follows:

> An authorization for a new standard broadcast station . . . will be issued only after a satisfactory showing has been made . . . (g) That the population within the 1 v/m (blanketing) contour does not exceed 1.0 percent of the population within the 25 mv/m contour: *Provided, however,* That where the number of persons within the 1 v/m contour is 300 or less the provisions of this paragraph are not applicable.

14. Evidence was initially offered which purported to show that the population within the blanketing contour was 967 persons or 1.15% of the population within the 25 mv/m contour. Based on facts developed in connection with this showing, however, counsel stipulated that "the radius of the 1 volt per meter (blanketing) contour which was drawn on the street map which Mr. Timm used in taking his actual house count is smaller than the actual radius of the proposed 1 volt per meter contour of 0.015 miles." In light of the foregoing, the Judge then presiding, rejected Timm Exhibit 4 but did afford the applicant an opportunity to reform his evidence.

15. The consulting engineer for Timm, thereafter, made a careful examination of the map which Timm employed in taking his house count and ascertained that the scale on the map was in error on the order of $\frac{2}{10}$ths of a mile per mile. Further investigation revealed that the coordinates specified in the application placed the transmitter site at a point outside the boundaries of Timm's property. Therefore, Timm commissioned a registered surveyor to ascertain precisely the tower location. The surveyor did ascertain that the coordinates specified in the application were incorrect by several seconds.

16. The exact location of the tower was then ascertained by the surveyor and confirmed by Timm's consulting engineer. A more accurate and up-to-date map of the area surrounding Timm's site was obtained from the Tallahassee-Leon County Planning Department. The transmitter site was located on this map and the blanketing contour depicted thereon. A further house count was taken on and after November 21, 1972, which indicated that the number of persons within the blanketing contour constitutes approximately 0.84% of the population within the 25 mv/m contour in compliance with section 73.24(g) of the rules. An amendment to correct the site coordinates in his application and to conform the application to the new data and a further amendment to reflect FAA clearance of the minor change in the site and to submit an affidavit from the surveyor in verification of his findings were accepted by order released January 15, 1973, without prejudice to the rights of the other parties to test the accuracy of the revised showing at the resumed hearing.

17. The house count was taken in the following manner: With the Planning Department map in hand, Timm and an assistant conducted a street by street canvass of all occupiable residences [4] within the blanketing contour. Timm drove and his assistant took notes. As they proceeded down each street, Timm counted the houses on his side and his assistant counted the houses on his side. When they got to the end of the street, they turned around and reversed the process. By this canvass, Timm determined that there are 248 occupiable residences within the blanketing contour.

18. The number of persons within the blanketing contour was computed as follows: The blanketing contour encompasses portions of Tallahassee proper and the adjacent Tallahassee Division. The number of houses (240) within Tallahassee proper was multiplied by a factor of 2.87, which is the average number of persons per occupied dwelling unit in the city. The number of houses (8) within the Tallahasssee Division was similarly multiplied by 2.95, which is the average number of persons per occupied dwelling unit in the division. Based on these computations, the population within the blanketing contour is 713 persons or 0.84% of the population within the 25 mv/m contour. Therefore, it is found that the population within the blanketing contour is less than 1 percent of the population within the 25 mv/m contour in compliance with section 73.24(g) of the rules.

CONCLUSIONS

19. Holt's testimony that he inadvertently failed to disclose the noted business connections is accepted. His testimonial assertion has not been challenged or controverted by any party to this proceeding and there is no evidence indicating purposeful or deliberate nondisclosure. Rather the circumstances indicate the contrary, particularly the facts that there were no conflicting applications until more than ten months after Holt filed his application and that disclosure of the

[4] Included in the count are three new houses which were "under roof", and the residences on two new streets and in a mobile park which did not oppear on the Planning Department map.

omitted connections would probably have had no material impact, comparatively or absolutely, on the success of the Holt application. There being no apparent intent or reason to conceal, it is concluded that the omissions do not reflect adversely on Holt's basic qualifications and consequently are not an impediment to his being reimbursed for his expenses incurred in the preparation and prosecution of his application.

20. Otherwise, the joint agreement between Holt and Timm is ripe for action. The party applicants have complied with section 1.525(a) by setting forth all relevant facts including (1) the exact nature of the consideration promised or paid; (2) information as to who initiated the negotiations; (3) summary of the history of the negotiations; (4) the reasons why it is considered that the agreement is in the public interest; and (5) a statement fully explaining and substantiating expenses in an amount in excess of the consideration paid or promised, i.e., an amount not to exceed $50,000. A grant of the joint petition will substantially foreshorten this already protracted hearing and pave the way for the early institution of broadcast service on 1070 kHz at Tallahassee. Therefore, the public interest will be affirmatively served by approval of the dismissal agreement.

21. The evidence further discloses that the population within Timm's proposed 1 v/m blanketing contour (713 persons) is 0.84% or less than 1% the population within his proposed 25 mv/m contour. Therefore, it is concluded that Timm's application complies with section 73.24(g) of the rules.

22. The aforenoted amendment of Timm revises his plan of financing to account for the sums to be paid out under the dismissal agreements with Talquin and Holt. Briefly, Timm's revised construction and first year costs total $179,500. To meet these costs, Timm has available $25,000 in existing capital and the net proceeds of a bank loan in the amount of $184,000. Thus, Timm has total resources of $209,000, which gives him a cushion of $29,500 to cover contingencies.

23. The remaining issues in this proceeding are (or will be) rendered moot by the dismissal of the Holt and Talquin applications. Timm is legally, technically, financially and otherwise qualified to construct and operate his proposed station and grant of his application will serve the public interest, convenience, and necessity.

24. Accordingly, IT IS ORDERED, That the Joint Petition for Approval of Agreement filed October 29, 1973, by Charles W. Holt and B. F. J. Timm is granted, the agreement is approved, and Holt's concurrent Motion to Dismiss his application is granted.

25. IT IS FURTHER ORDERED, That Timm's Petition for Leave to Amend filed December 5, 1973, is granted, and the amendment tendered therewith is accepted and the amendment and Joint Petition for Approval of Agreement are incorporated into the record by reference.

Accordingly, IT IS ORDERED, That unless an appeal to the Commission from this Initial Decision is taken by a party or the Commission reviews the Initial Decision on its own motion in accordance with the provisions of secton 1.276 of the rules, the application herein of

Charles W. Holt is dismissed and the application of B. F. J. Timm for authority to construct and operate a new standard broadcast station of 1070 kHz with power of 10 kilowatts, Day, is granted subject to the following conditions: [5]

Before program tests are authorized, sufficient field intensity measurement data shall be submitted to establish that the radiation pattern is essentially omnidirectional, and that the inverse distance fields at one mile are essentially 670 mv/m/10 kw, as proposed.

The proposed antenna shall be excited with a folded unipole feed, utilizing a minimum of four (4) folds.

FEDERAL COMMUNICATIONS COMMISSION,
FOREST L. MCCLENNING, *Administrative Law Judge.*

[5] The order of designation specifies that a grant to Timm should also be subject to the condition "The permittee shall install an approved frequency monitor." The frequency monitor requirement has since been deleted from the rules. See In the Matter of Amendment of Sections 73.40 *et al.* of the rules concerning Frequency Monitors and the maintenance of the operating frequency of stations [38 FR 22385, 28 RR 2d, 311 (1973)].

104-029—74——4

FCC 74R-69

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of ITT WORLD COMMUNICATIONS, INC., COMPLAINANT *v.* THE WESTERN UNION TELEGRAPH COMPANY, DEFENDANT Complaint, Pursuant to Section 208 of the Communications Act of 1934, Demanding Compensation for Expenses Incurred in the Handling of Messages on Behalf of the Western Union Telegraph Co.	Docket No. 19344

APPEARANCES

Howard A. White and *William F. Finnegan*, on behalf of ITT World Communications, Inc.; *Kenneth W. Gross* and *Laurence Singer*, on behalf of Western Union Telegraph Company; and *Paul M. McDonough* and *Michael A. Cappelletti*, on behalf of the Chief, Common Carrier Bureau, Federal Communications Commission.

DECISION

(Adopted February 22, 1974; Released March 7, 1974)

BY THE REVIEW BOARD: BERKEMEYER, NELSON, AND KESSLER.

1. On May 1, 1968, Western Union Telegraph Company (WU) proposed to initiate a new procedure for forwarding internationally bound telegrams to ITT World Communications, Inc. (ITT). Although the new procedure took effect as scheduled, WU was unable to process the messages and deliver them to ITT in the format originally contemplated by the new operation. As a consequence of its inability to perform the offered service, the parties came to an agreement whereby ITT assumed the duties of receiving the messages directly from WU's customers, leaving compensation for this service to future "good faith negotiations." Unable to reach a financial settlement, ITT filed a complaint seeking compensation in the sum of $250,537, plus interest, for the costs it allegedly incurred as a result of WU's inability to effectuate its proposal as originally contemplated. Pursuant to the provisions of Sections 4(i), 4(j), 201, 206, 207, 208, 209 and 222 of the Communications Act of 1934, as amended, the

Commission designated the complaint of ITT, *inter alia*,[1] for hearing on the following issues:

A. Based upon applicable provisions of law, Commission rulings and agreements, understandings and arrangements between Western Union and the complainants, what were the respective responsibility of Western Union and the complainants for providing the various operations required in the handling of telex initiated international telegraph service: (1) before May 1, 1968, (2) during the "CD" period from May 1, 1968 to September 30, 1968, (3) during the "direct access" (DA) period from October 1, 1968 to October 31, 1969, (4) subsequent to October 31, 1969.

B. Were any operations which should have been performed by Western Union, in fact, partly or wholly performed by any of the complainants during the period May 1, 1968–September 30, 1968, and the period October 1, 1968–October 30, 1969.

C. To the extent that the complainants did, in fact, perform any operations which should have been performed by Western Union, what, in light of all the facts and circumstances, should be the measure and amount, if any, of damages which Western Union should be required to pay to each of the complainants.

Memorandum Opinion and Order, FCC 71–1134, released November 8, 1971, 32 FCC 2d 315. In an Initial Decision, FCC 73D–5, released February 9, 1973, Administrative Law Judge Basil P. Cooper awarded reimbursement to ITT for costs it incurred during both the "CD" and "DA" periods. Computation of those costs, however, was left to the parties, and they were subsequently unable to arrive at an agreeable figure. The proceeding is now before the Review Board on exceptions filed by WU and ITT and comments by the Chief, Common Carrier Bureau. We have reviewed the Judge's Initial Decision in light of the exceptions and comments, the arguments of the parties,[2] and our examination of the record. Except as modified herein and in our rulings on exceptions contained in the attached Appendix, the Judge's findings and conclusions are adopted. In brief, the Board is in basic agreement with the Judge's conclusions regarding the DA period but believes that some further amplification is warranted. As to the CD period, the Board, unlike the Judge, is of the view that no reimbursement is warranted. We have summarized below the significant facts considered in reaching our judgment.

2. With only minor exception, international telegraph service is provided jointly by Western Union and the various international carriers. The processing of a message includes not only the making of an accurate record for the benefit of the sender and protection of the carrier, but also all the essential functions of handling messages from the time of filing to the time it leaves the carrier for outbound transmission. In transmitting messages, the international carriers use a different format from that used by Western Union.[3] Although Western Union's domestic format is compatible with its own reperforator switching system, it is not compatible with the format used by interna-

[1] The complaints of the other common carriers were settled without the necessity for a hearing and are, therefore, not before the Board.

[2] Oral argument was held before a panel of the Review Board on December 4, 1973.

[3] The term "format" refers to the standardized sequence of component parts of the telegram, or message, as put on the circuit for transmission.

tional carriers—hereinafter referred to as the F–31 format. This means that when a domestic customer files an internationally bound message with Western Union, Western Union transmits the message over its own system in domestic format and either has to convert the message to the international F–31 format before it reaches the international carrier or the latter must convert the message itself before it can be transmitted overseas.

3. Although the record does not contain a description of the message handling arrangements that were in effect prior to 1966, the clear implication of both the testimony and the exhibits is that domestically filed internationally bound messages were received in Western Union's New York office, processed there, and then forwarded, by pneumatic tube, to the offices of ITT where they would be further processed, including, since 1965, conversion to F–31 format by ITT. In early 1966, Western Union initiated a new procedure—referred to as the Twenty-five City Operation—whereby telex [4] originated messages in 25 selected cities were converted by Western Union to the F–31 international format and transmitted directly to ITT. This procedure decreased manual handling of the messages by ITT.[5] In mid-1967, Western Union commenced a procedure whereby a message initiated by a telex customer from any one of the 1500 Western Union operated offices around the country would be transmitted through the reperforator system to a local center and switched to Kansas City. In Kansas City, the message would be transmitted to ITT's office in New York in domestic format. ITT would convert the message to F–31 format for outbound transmission. After the Kansas City operation was begun, pneumatic tube traffic in New York was generally confined to messages not routed specifically to ITT and which, therefore, had to be processed for routing to one of the international carriers based on the quotas established by the International Formula. See WU Exhibit 1, attachment c which describes the procedures employed in ITT's operating room depending on the various methods of reception. These procedures coincide with those described in ITT's Exhibit 2, attachments 1–6. It is of critical significance that all of the operations necessitated basically the same procedures except the Twenty-five City Operation which, since ITT received the message already converted to F–31 format, only necessitated the use of an operator and searcher/filer. This difference is important to ITT's allegations for recovering its costs and will be discussed, *infra*. To summarize, in early 1968, ITT could receive internationally bound messages from Western Union in three ways: (a) via the pneumatic tube from WU's New York office; (b) directly from

[4] "Telex is a switched service that includes the provision of facilities, including terminal equipment, for the transmission of record communications directly between any two Telex subscriber stations." *Proposed Revisions in the Rates of the Western Union Telegraph Co. for Tieline Domestic Interstate Telegraph Service*, 27 FCC 2d 515, 522, 21 RR 2d 81, 89 (1971). In other words, Telex refers to a method of originating and accepting messages on a type of teleprinter that is similar to the commonly recognized teletypewriter.

[5] The Administrative Law Judge points out that WU insisted that this operation was strictly experimental and that it was not successful due to a number of factors. ITT excepts to the characterization of the operation as experimental and argues that although a WU witness testified that the Twenty-five City Operation was considered unsatisfactory in 1968, a statement submitted to the Commission by WU in October 1969 indicates that the operation was still in effect and operating satisfactorily. ITT claims that Western Union misrepresented the status of the operation to the Commission. The Board does not find this apparent contradiction to be of sufficient decisional significance to affect the ultimate outcome of this proceeding.

WU's Kansas City office; and (c) directly from those cities participating in the Twenty-five City Operation. In (a) and (b), the message had to be converted to F–31 format by ITT; in (c) it was already in the International format.

Western Union Proposal

4. In a letter to the Commission dated October 3, 1967, WU advised the Commission of discussions with the international carriers looking toward initiation of a new service which would allow a telex customer to route outbound traffic via the facilities of an international carrier by dialing a discrete telex number for the specified international carrier or a different number for the transmission of unrouted messages. Parts of the proposal are reflected in the correspondence from Western Union. By letter, dated October 3, 1967, the broad outline of the plan was described:

> WU will forward the routed messages on a direct circuit to the appropriate international carrier in the F–31 format to be terminated at the international carrier's office on equipment of the international carrier.
>
> The anticipated inauguration date of this arrangement is on or about November 1, 1967....

By letter, dated November 15, 1967, Western Union described more details of the proposed services, in part, as follows:

> The proposed service comprehends the initial installation in the "CD" New York operating room of 24 Telex receiving printers, six each assigned to RCA, ITT, and WUI, for reception of international messages originating with hinterland subscribers specifically routed by the sender via the respective carrier, plus six for the receiving of unrouted . . . messages from hinterland subscribers . . . .
>
> * * * * * * *
>
> Western Union will provide sufficient circuitry to each of the international carriers to meet the operating and service requirements of the direct transmission of those messages not requiring quota processing. These messages will be transmitted to the international carriers in CCITT F–31 format, *except as otherwise agreed upon.*[6] (Emphasis supplied.)
>
> Service messages involving traffic filed by this method will be handled by Western Union, including the querying and reporting of telex subscribers. Complaint and claim procedures involving all international traffic will remain unchanged.

By letter, dated November 24, 1967, Western Union furnished the Commission additional information relating to its proposals. In this letter, Western Union stated, in part:

> Messages specifically routed to ITT and RCA will be perforated by WU in "CCITT" F–31 format and immediately transmitted direct to their respective operating rooms over two teleprinter circuits to each carrier.

5. Initiation of WU's proposal as of November 1, 1967, was delayed in order to allow the Commission to rule on the new proposal. In *Western Union Telegraph Company*, FCC 68–188, 11 FCC 2d 946, the Commission held that the proposal was consistent with the terms of the

[6] ITT excepts to the Judge's emphasis on the language, "except as otherwise agreed upon," and points out that from the context of the next full paragraph as well as other letters, this language referred to WU's exception of processing messages in F–31 format for one particular carrier. The Board has reviewed this language and agrees with ITT's contention and therefore does not believe that this particular language was intended to indicate a possible circumvention of processing messages for ITT in F–31 format.

International Formula governing the routing of internationally bound messages. A date of May 1, 1968, was set for initiation of the new procedure and, prior to that time, ITT, WU and the other international carriers promoted the new method in the Telex Directory and by other means. By letter dated March 14, 1968, WU notified ITT that the proposed service would commence May 1, 1968, but that conversion of the messages to F–31 format would not begin until June 1, 1968. In its exceptions, WU claims that, notwithstanding the above March 14 notice of delay, ITT continued to promote initiation of the new proposal for May 1, 1968. Although the record supports WU's claim that such promotion was continued in March, 1968, the exact dates are not clear, except that one promotion on April 30 was carried out by ITT.[7] Rather than cancel the initiation of the new service on May 1, 1968, it went into effect without the conversion of messages into F–31 format. The favorable response to the operation was surprising from the very beginning and the WU NY "CD" office was inundated daily. The overload led WU to conclude that additional staffing was required—a task hampered by labor problems and a 10-week training period—and that given these conditions it could not meet the impossible demands upon its "CD" operation.[8] Many of the message word counts were incorrect and recounts had to be made by ITT. Counting the message was, however, traditionally performed by ITT for the Kansas City and pneumatic tube traffic.

The Direct Access Period

6. In order to cope with the excessive demand incurred by WU during the CD period, WU wrote, by letter dated July 23, 1968, to ITT, and stated, in part, the following:

> Western Union proposes that for a period of three months beginning as promptly as possible the following arrangements be made effective:
>
> 1. Direct connection arranged for unattended operation will be established to the international carriers' operating rooms for the reception of outbound international messages directly from domestic telex subscribers. All messages specifically routed by the subscribers via the specified telex numbers to be terminated at the international carriers' offices. The unrouted messages will continue to be handled at the "CD" New York.
>
> * * * * * * *
>
> 3. Western Union will continue to perform all of the necessary billing and accounting work for this traffic. Copies for this purpose will be obtained by Western Union from monitor printers in its own office.
>
> 4. There will be no change in the present authorized domestic landline per word charges for this traffic. But, out of such charges during the trial period, Western Union will compensate the international carriers for the performance by them of certain of the work which would ordinarily be performed by Western Union. Such operations are as follows: (a) For the labor involved in call-backs

[7] One of the factual disputes between the parties is whether promotion and implementation of the new service diverted traffic from the Twenty-five City Operation, where messages were processed in F–31 format, to the CD office, where, due to the heavy traffic, WU had to forward the messages in domestic format, thereby giving rise to continued manual handling by ITT and added expense. This matter is highly speculative and, therefore, has not been considered in reaching our decision.

[8] The period between May and October 1968, is generally referred to as the CD period—this is the period when 1041 messages (*i.e.*, messages specifically routed to ITT by telex customers dialing #1041) were sent to ITT via pneumatic tube in domestic rather than F–31 format.

and service correspondence with the telex patrons on messages sent to them. Preliminary and very approximate figures indicate this cost to average 1.3¢ per message received. (b) *Any difference* in cost between receiving this traffic directly from telex patrons and the cost of accepting it by usual intercarriage wire operation, the costs for which are included in the authorized per word landline haul rates. This is one of the matters to be evaluated during the three months' trial, but we are willing during the trial period to arbitrarily fix the compensation for this function at 5.7¢ per message. The total reimbursment to the international carriers during this trial period would thus be 7¢ per message.

Such compensation will not serve to modify either the telex or the landline haul provisions; it will simply constitute an agreement between Western Union and the individual carriers providing for reimbursement of the international carriers for work which they will be doing in our behalf at the rates stated in the foregoing sub-paragraphs (a) and (b).

5. The above arrangements will be established on a temporary basis for approximately 90 days during which time the international carriers and Western Union will attempt to mutually agree to a satisfactory compensation arrangement if the direct access method is continued beyond the trial period.

As I indicated to the international carriers at the joint meeting, Western Union is presently looking into the possibility of handling this traffic through the use of interim computer techniques pending the development and implementation of an overall plan for handling international traffic under Western Union's modernization program. As I explained to you, the full implementation of the domestic modernization program will take at least two years. Any arrangement now made effective for direct access by telex subscribers to the international carriers is subject to change as the modernization plan develops.

In the event the interim computer handling method is feasible, Western Union will discontinue the direct telex connections at the end of the trial period or earlier, and transfer the traffic to the international carriers via the computer. There may also be other alternate methods proposed by any of the carriers to consider.

7. The above offer of compensation was unacceptable to ITT. Therefore, by an agreement dated September 17, 1968, Western Union and ITT, as well as the other common carriers, sought to resolve the operating difficulties. For a period of three months beginning September 30, 1968, Western Union agreed to disconnect one of its telex machines in the Western Union New York office and relocate it in the offices of ITT. The significant portion of the arrangement stated the following:

During the trial period or until other operational billing or accounting arrangements are agreed upon by the parties or ordered by the Federal Communications Commission (Commission), the present divisions of charges shall be maintained, provided, nevertheless:

(a) *Such divisions shall be the subject of good faith negotiations to commence promptly, between Western Union and each of the international carriers, looking to the establishment of retroactive financial arrangements appropriate to the operational, billing or accounting arrangements in effect commencing September 30, 1968* (including any continuance of such arrangements) *or to any subsequent changes therein and, to the extent necessary, shall be subject to the approval of the Commission;*

(b) Should the parties hereto fail to agree as to the financial, operational, billing or accounting arrangements during the aforesaid three (3) month period, or the continuance of the arrangements herein set forth beyond the three (3) month period, any of the parties may pursue such course as it may deem appropriate. (Emphasis supplied.)

8. The Direct Access Period began on September 30, 1968, and was in effect for a period of about one year. ITT now claims that it is entitled to compensation for services performed by operators, routers, service writers, seacher/filers and supervisors during the CD and DA periods.

As set forth by the Judge, the details of the original and amended claims of ITT for services performed are summarized as follows:

	CD period	Direct access	Total
Original complaint	$35,475	$205,091	$240,566
Amended complaint	38,935	211,602	250,537
Operators:			
Receiving		526	
Sending	559	964	
Customer callback		48	
Counting clerks		578	
Routers	230	319	
Service writers	297	436	
Searcher/filers	139	269	
Supervisors	214	220	
Pickup clerks	125	139	
Subtotal	1,564	3,499	
Fringes	[1] 207	[2] 497	
Total average weekly cost	1,771	3,996	

[1] 15 percent.
[2] 15.5 percent.

In the amended complaint, the breakdown of messages handled and the cost per message is shown as follows: "CD" Period, 86,524 messages handled—cost $0.45 per message, "Direct Access", 325,541 messages handled—cost $0.65 per message.[9]

9. Western Union concedes that it is liable to ITT for work "which would ordinarily be performed by Western Union." WU would limit this liability, however, to (a) the cost to ITT for call-backs and service correspondence with the telex patrons on messages sent by them, and (b) the difference in cost between receiving traffic directly from the telex patron and the cost of accepting it by usual inter-carriage wire operation, the costs of which are included in the authorized per word landline haul rates. WU points out, and the fact is confirmed by the record, that ITT did not have to increase its personnel during the CD and DA periods, but, contrary to WU's contentions, ITT witnesses maintained that overtime was high during the CD and DA periods.

10. For the CD and DA periods, the Judge allocated costs as follows: (a) ITT—to collect $38,935 less what was paid to "routers" and "operators" (sending) for the CD period; (b) ITT—to collect $211,062 less what was paid to "routers" and "operators" (sending) for the DA period.

The Judge determined that WU should bear the costs associated with gathering, processing and initially delivering the telegram to ITT (this includes the DA and CD period since initial processing was usually done by WU); ITT was to bear all costs associated with converting the telegram into the international format and all subsequent

[9] WU claims that the cost of $526 attributed to receiving operators during DA should be reduced to $208, eliminating the unfounded cost of paying these operators for overtime. Since no detailed "division of labor" records were kept, it is impossible to determine, with certainty, whether receiving operators did in fact work less overtime then sending operators. Although, as substantiated by the record, WU customers were generally closed on the weekends and therefore few messages arrived at ITT's offices on the weekend, the claim of overtime does not appear to be unreasonable and, therefore, should not be rejected.

steps. Judge Cooper's ultimate award of costs is primarily based on the rationale that these parties were engaged in a joint and cooperative effort in providing international message service and, therefore, each must bear some expense in helping the other.

WU's Exceptions

11. Western Union's main contention is that it has no obligation to reimburse ITT for any costs associated with functions historically and normally performed by ITT. WU alleges that ITT performed no functions, except as discussed *infra*, which were traditionally WU's functions whereas WU did offer to assume ITT's functions. WU further maintains that, notwithstanding the deay in implementing the proposal, both parties benefited from the increased traffic. WU argues that the processing of telex-originated internationally bound message traffic during the CD and DA periods was essentially the same as before the CD period. WU claims that the only function not performed traditionally by ITT was that of the service center which, during the DA period, made contact with WU's customers directly. Thus, asserts WU, it is liable only for these additional costs incurred by ITT; the division of charges established by the carriers and approved by the Commission already take into account the other functions performed by ITT.

ITT's Exceptions

12. ITT's first contention is that this is a contract case and that the laws of New York govern the parties' obligations. Based on New York law, ITT maintains, an enforceable contract existed between ITT and WU, consideration flowing by virtue of the mutual promises made by each of the parties. (ITT promised to enter into an electrical interconnection with WU's CD office, to receive telex filed overseas telegraph messages, to accept the dialing of telex numbers to the various carriers as a routing under the International Formula and to otherwise cooperate so as to effect the proposal which WU promised to implement.) ITT maintains that it is entitled to recover all costs during the CD period based on the theory that it should be put in as good a position as it would have been in had WU fulfilled its obligation. With respect to the DA period, ITT contends that since no fixed compensation was agreed upon in the September agreement, it is entitled to the fair value of the manual message processing it performed. ITT also asserts that on the theory of quantum meruit it is entitled to the reasonable value of the services it performed. Finally, ITT claims that it is entitled to interest on the damages calculated from the date of its complaint. Analysis of the legal obligations of these parties must be divided into two time segments: (a) the CD period; and (b) the DA period.

Analysis

13. *CD Period.* The Board agrees with the Bureau's analysis of the legal obligations of the parties during the CD period and its conclusion that ITT did not meet its burden of establishing the ex-

istence of a contractual relationship to support its claim for reimbursement. We agree with the Administrative Law Judge's conclusion that ". . . neither Western Union, ITT, nor any other carrier considered and treated the Western Union proposals to be firm offers or commitments which Western Union was bound to honor under any and all conditions." It is clear that Western Union sought to establish efficient methods of handling internationally bound messages and that this necessitated a certain degree of trial and error. Although Western Union needs the consent of the other carriers before initiating new procedures, it appears equally clear that such procedures are implemented out of a cooperative effort to maximize efficiency and, of course, revenues. Moreover, the initiative for implementing such new procedures does not need Commission approval so long as these procedures are consistent with the International Formula and other provisions of law. *Western Union Telegraph Company*, FCC 68–188, 11 FCC 2d 946, 953. In accepting a proposal by which WU would assume ITT's traditional function of converting the messages into the international F–31 format, ITT was merely agreeing to cooperate with Western Union in looking for more efficient ways to expedite the transmission of internationally bound telegrams. Such acceptance had clearly been worked out in the past with respect to the Kansas City Operation and the Twenty-five City Operation, discussed *supra*. We agree with the Bureau that in spite of the difficulties encountered by both parties stemming from the unexpected heavy volume of messages generated by customer acceptance and utilization of the new procedure, "the record is lacking in any persuasive evidence that ITTWU, throughout the CD period, regarded WU's inability to fully perform its proposal as a breach of contract." As is reflected in WU Exhibit 1 and ITT Exhibit 2, pneumatic tube traffic required ITT to perform the operations of converting the messages to F–31 format, pick up the messages from the box, file them in sequential order, and handle certain service messages—the latter function performed by a service writer. During the "CD" period, these same exact functions continued to be performed by ITT. In the DA period, discussed *infra*, the parties entered into a *written* contract in which ITT agreed to undertake functions previously performed by WU. In the CD period, no similar situation existed; there was neither a written agreement nor an assumption by ITT of functions traditionally performed by WU. In fact, in applying the basic elements of contract law, the Board is of the view, as suggested *supra*, that WU made no offer by which ITT could bind WU by acceptance. Viewed from the on-going relationship of the parties and their prior dealings, it appears that WU offered no more than a hope or desire that it could effectuate a proposal which would efficiently expedite transmission of internationally bound messages—and such expression of hope or desire does not constitute an offer capable of giving rise to contractual obligations if accepted. It seems clear to the Board that in agreeing to the new proposal, ITT had no expectation of compensation from WU for agreeing to receive messages pursuant to the new procedures—WU was, in fact, offering to assume functions traditionally performed by ITT. Consequently, the Board disagrees with

the Judge's conclusion that WU should bear some of the expenses claimed by ITT during the "CD" period. Finally, since ITT performed no additional processing functions during the "CD" period, there is no theory of implied contract pursuant to which ITT would be entitled to compensation.

14. *DA Period.* The relationship of the parties during the direct access period presents a far more difficult problem. It is clear from the record that ITT refused Western Union's original offer that compensation be limited to 7¢ a message based on what WU considered to be the additional functions which ITT would be assuming if they agreed to the direct access arrangement. Rather than be faced with the intolerable situation which existed during the CD period, however, the parties agreed to the direct access arrangement and left open the amount of compensation. Although the existing division of charges remained unchanged, the parties agreed that "[s]uch divisions shall be the subject of good faith negotiations. . . ." In the same vein that ITT claims it is entitled to more than just additional costs associated with servicing the messages, *i.e.*, labor involved in call-backs and service correspondence with telex patrons—a service which WU admits was traditionally theirs—Western Union has an equally persuasive argument that the agreement did not contemplate full reimbursement based on what ITT would have saved had WU fulfilled its obligations as originally proposed for the CD arrangements. Although no contractual relationship existed during the "CD" period, WU did offer, in a written agreement dated September 17, 1968, to allow messages routed to ITT to be received directly from the telex customers, thereby eliminating any processing by WU. This offer was accepted by ITT.[10] Pursuant to that agreement ITT not only continued to convert the messages into F–31 format and perform the necessary functions thereafter, as noted *supra*, but also assumed those initial processing functions which had previously been performed by WU, by operators, counting clerks, routers, pick-up clerks and supervisors—functions which were performed before conversion of the message to F–31 format. The September agreement neither specified the functions subject to compensation, nor the amount of compensation. This matter was left to future good faith negotiations. It is clear, however, that in the negotiations leading up to the agreement, ITT rejected WU's offer that compensation be limited to the expenses incurred by ITT for the call-back and service correspondence functions, which had traditionally been performed by WU. Nevertheless, the contract in question was fully executed and now all that remains is for the Board, regretfully, to act as an arbitrator because of the unexplained inability of these two parties to reach an agreement as to compensation. After reviewing this record and hearing oral argument, the Board attempted to encourage the parties to reach an agreement by negotiations among themselves. Our Order,[11] released after oral argument, and directing that the parties

[10] Thus, during the DA period, unlike the CD period, there was a written offer, acceptance, and valid consideration, *i.e.*, ITT's assumption of functions traditionally performed by WU were contractually assumed. No comparable consideration was present during the CD period.

[11] FCC 73R–400, released December 7, 1973.

again attempt to reach a compromise settlement and explain what further good faith negotiations took place was not taken as seriously as the circumstances warranted.[12] As set forth below, our conclusions are based on what we perceive to be a fair compromise that could have been reached by the parties through good faith negotiations. Furthermore, since we do not view ITT's claim for compensation as an action for damages based on a breach of contract, we will deny their claim for interest. There never was a determined amount certain payable on a day certain from which reimbursement was due.

Costs

15. As discussed, *supra*, the events which led to formulation of the September agreement reveal that ITT found WU's limited compensation offer unacceptable and WU found itself in a situation which necessitated that it make some agreement with ITT. While it can be equally assumed that WU would have found a claim by ITT that it (WU) bear all the expenses associated with assuming the operation unacceptable, it is not unreasonable to conclude that WU had to expect at the time of the making of the agreement that "good faith negotiations" meant more than its original offer. WU concedes that it should bear some of ITT's expenses during this period, and the Judge's allocation of costs, as calculated by the Bureau, appears to represent a reasonable value to be placed on the services rendered. Since ITT rendered services, pursuant to this agreement, which had been traditionally performed by WU, the calculations below are based on compensating ITT for those functions which, but for the agreement, would have been performed by WU—namely, as set forth in WU Exhibit 1 and ITT Exhibit 2, the duties performed by operators, counting clerks, routers, pick-up clerks and supervisors before the message was converted to the F–31 format. Those expenses associated with conversion to F–31 format and steps taken thereafter were left to be assumed, as always, by ITT.

16. Pursuant to the Judge's Initial Decision, the parties submitted separate estimates for the direct access period based on the Judge's formula—ITT calculated it was owed $139,892; WU calculated it owed $61,889. The Board agrees with the Bureau that WU improperly excluded costs for supervisors and pick-up clerks which were traditionally Western Union's functions but properly excluded costs allocated to searcher/filers which were traditionally functions performed by ITT after conversion to the F–31 format. With respect to the disparity in allocating costs for Service Writers, it has been extremely difficult to determine which figure is more accurate and therefore the Board has arrived at a median figure. With respect to overtime pay, the Board also agrees with the Bureau that ITT's formula, although based on a sample rather than actual records for the entire period, is not unrea-

[12] On December 13, 1973, the parties responded to the Board's above Order by stating that "[w]hile each side was willing to deviate somewhat from the final offer it had made prior to the hearing, neither felt it could deviate enough to permit a compromise settlement."

sonable and will be utilized. The Board therefore concludes that ITT be awarded $115,175.[13] In our view, this amount represents a reasonable value to be placed on ITT's services during the direct access period. Thus, the Board proposes that the Judge's conclusions, insofar as they award costs to ITT for the CD period, be reversed; with respect to the direct access period, we propose that the Judge's conclusions be adopted and that the Bureau's calculations (resulting in an award of $115,175) be incorporated; and that interest not be recovered.

17. Accordingly, IT IS ORDERED, That Western Union Telegraph Company COMPENSATE ITT World Communications, Inc., for the functions it performed from October 1, 1968 to October 31, 1969 (DA period) in the sum of $115,175; and that ITT World Communications, Inc.'s claim for compensation during the period of May 1, 1968 to September 30, 1968 (CD period) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
DONALD J. BERKEMEYER, *Member, Review Board.*

APPENDIX

RULINGS ON THE EXCEPTIONS OF WESTERN UNION TELEGRAPH COMPANY

Exception No.	*Ruling*
1	Granted. Exceptor's definition of "processing" is supported by the record evidence.
2	Granted for the reasons stated in exception 1 above.
3	Granted. As Western Union points out, before 1966, messages reached ITT via Western Union's office in New York where they were processed and forwarded to ITT by pneumatic tube.
4	Granted.
5	Denied as being without decisional significance.
6	Granted in part. As Western Union points out, the processing of internationally bound messages, which were sent through the reperforator system prior to mid-1967, did not find their way to the New York "CD" office out of error, as stated by the judge, but were part of the normal processing in effect at that time. With respect to the processing functions employed by ITT prior to mid-1967, and in particular, with respect to processing of messages via pneumatic tube, Western Union outlines those functions as described in ITT's exhibit labeled "pneumatic tube (unrouted)." It seems apparent that this portion of the exhibit does outline those functions employed by ITT before the Kansas City operation in mid-1967 went into effect, exclusive of the 25-city operation. In this regard, see decision paragraph 3. The significance of these functions is discussed in the text of the decision at paragraphs 3, 8, 10, 15, and 16 of WU exhibit 1 and ITT exhibit 2. In all other respects, the exception is denied, since the judge's findings regarding these matters are adequate and accurate.

[13] The calculations are as follows:

ITT DA as calculated in letter of Feb. 16, 1973	$139,892
Less: Searcher/filers (but above figure includes supervisors and pickup clerks)	16,371
Less: Service writers reduction of one-half of difference between ITT and WU costs	8,346
Total recommended reimbursement	115,175

Exception No.	*Ruling*
7	Denied. Whether messages specifying a particular carrier are always honored or, as the judge expressed it, "in most instances," is of no decisional significance in reaching our conclusion.
8	Granted. Although there is some conflicting testimony and evidence regarding the effectiveness of the 25-city operation, it would appear that the limited nature of this operation does warrant the finding that it was experimental. The decisional significance of its characterization is questionable, however. In this regard, see paragraph 3, footnote 5, of this decision.
9	Granted.
10	Denied as being of no decisional significance.
11	Granted to the extent expressed in paragraph 5 of this decision, and denied in all other respects as unsupported by the record.
12	Granted in substance. In this regard, see decision paragraph 5.
13	Denied as being of no decisional significance. In any event, this matter is covered in the initial decision at paragraph 10.
14	Granted in part and denied in part. To the extent that the word "searcher" should be deleted from the last sentence, the exception is granted. As for ITT's allegations regarding which functions should have been performed by Western Union, see the text of this decision, and, in particular, decision paragraph 3.
15	Granted in part and denied in part. In light of our decision not to hold WU liable for any costs during the CD period, the matter raised is without decisional significance. In regard to the DA period, see paragraph 8, footnote 9, of this decision and our ruling on exception 17, *infra*.
16	Granted in part and denied in part. See the text, and in particular, paragraphs 13–16 of this decision.
17	Denied in substance. The question of whether ITT realized benefits from initiation of the telex operation is irrelevant to a determination of whether, by virtue of their contract of September 1968, they are entitled to reimbursement pursuant to that agreement. In addition, although overtime may have remained at normal levels, it is nevertheless not unreasonable to conclude that a proportion of that, as allocated by ITT, was attributable to performing the necessary function under the September agreement. In all other respects, the exceptions taken have either been adequately covered in the initial decision or are of no decisional significance.
18	Granted in substance. See decision paragraphs 13–16.
19	Granted.
20	Granted in part and denied in part. With respect to Western Union's obligation to reimburse ITT during the "CD" period, the exception is granted in substance. See paragraph 13 of this decision. With respect to the direct access period, however, the exception is denied in substance. See decision paragraphs 14–16.
21	Granted in substance. See decision paragraphs 5 and 13.
22	Denied in part and granted in part for the reasons stated in our ruling on exception 20.

RULINGS ON EXCEPTIONS OF ITT WORLD COMMUNICATIONS, INC.

Exception No.	*Ruling*
1	Denied as being of no decisional significance.
2	Granted. See our ruling on Western Union exception 2.
3	Denied. See paragraph 3 of the decision and our ruling on WU exception 6.
4	Granted. The matters discussed in the initial decision are without decisional significance.
5	Denied. The judge's finding and conclusion do not imply that research and development were the sole motivation for initiating new procedures. It is clear, however, that a more efficient method of handling the processing of internationally bound messages were a basic benefit of the new proposal.
6	Denied. See our ruling on exception 3.
7	Granted in part and denied in part. With respect to ITT's argument that the processing functions for the various operations should have been detailed in the initial decision, the exception is granted. With respect to ITT's claim of misrepresentation and the diversion of traffic from the 25-city operation, the exception is denied. In this regard, see paragraph 3, footnote 5 of this decision. With respect to the 25-city operation discussed in subparagraph d, see decision paragraph 5, footnote 7.
8	Denied. These matters are adequately and accurately discussed in the initial decision.
9	Denied in part and granted in part. The judge's initial decision adequately and accurately reflects that Western Union was not able to effectuate its proposal of May 1, 1968, until initiation of the Greensboro proposal. With respect to ITT's claim that Western Union's proposal envisioned transmitting the unrouted messages in F–31 format electronically the exception is granted.
10	Granted. See paragraph 4, footnote 6, of this decision.
11	Denied as being of no decisional significance.
12	Denied. Although Western Union made the representation noted by ITT, the matter is of no decisional significance regarding the compensation claimed by ITT.
13	a. Granted. b. Denied as being of no decisional significance.
14	Denied. The alleged faulty "sampling survey," as well as Western Union's other problems in not being able to initiate its proposal as originally contemplated, are of no decisional significance regarding the compensation to be granted ITT. See decision paragraphs 13–16.
15	a. Granted. b. Denied as being without decisional signicance.
16	a. Granted. b. Denied as being without decisional significance.
17	Denied. This fact, standing alone, is of no decisional significance. See the legal basis for awarding ITT reimbursement discussed in paragraphs 14–16 of the decision.
18	Denied. See our rulings to exceptions 1 and 5.
19	Granted. See our ruling on exception 4.
20	Denied in part and granted in part. a. Denied. The matters raised are without decisional significance. Also see our ruling on exception 5. b. Granted. Although it appears true that ITT did not expect Western Union to be hampered with the difficulties which in fact developed, that lack of expectation has no decisional significance regarding their claim of compensation.

Exception No.	*Ruling*
21	a. Denied. The matter raised is adequately covered in conclusion paragraph 10 of the initial decision. b. Denied. The matter is without decisional significance. c. Denied. The matter raised is adequately covered in finding paragraphs 37 and 41 and conclusion paragraphs 9 and 10 of the initial decision.
22	Denied. The quoted material merely suggests that the means by which telegram service is carried out is a cooperative effort of both Western Union and the international carrier. The Board fails to understand the significance of ITT's exception. The quoted sentence only suggests that the initiative for handling domestically filed internationally bound messages rests with Western Union.
23	Denied. Although it does appear that fulfillment of Western Union's proposal would eliminate all of ITT's manual processing functions, this conclusion is not of decisional significance in determining Western Union's liability for not having initiated its proposal as originally contemplated. In this regard, see paragraphs 13–16 of this decision. In any event, this matter is suggested by the Judge in paragraph 13 of the conclusions.
24	a. Denied. The matter raised is without decisional significance. b. Denied. See paragraph 13 of this decision.
25	Denied. The matter raised in the first paragraph is without decisional significance. The matter raised regarding direct access has been adequately covered in the findings of the initial decision at paragraphs 37–41.
26	Denied. See paragraphs 14–16 of this Decision.
27	Denied in part and granted in part. The basis for ITT being entitled to compensation is discussed in paragraphs 13–16 of this decision.

FCC 73D–5

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of ITT WORLD COMMUNICATIONS, INC., COMPLAINT *v.* THE WESTERN UNION TELEGRAPH COMPANY, DEFENDANT Complaint, Pursuant to Section 208 of the Communications Act of 1934, Demanding Compensation for Expenses Incurred in the Handling of Messages on Behalf of the Western Union Telegraph Co.	Docket No. 19344

APPEARANCES

Howard A. White and *William F. Finnegan*, on behalf of ITT World Communications, Inc.; *Kenneth W. Gross*, on behalf of Western Union Telegraph Company; and *Paul M. McDonough* and *Michael A. Cappelletti*, on behalf of the Chief, Common Carrier Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE BASIL P. COOPER

(Issued February 5, 1973; Released February 9, 1973)

PRELIMINARY STATEMENT

1. On April 30, 1971, ITT World Communications, Inc. (ITT) filed with the Commission a formal complaint wherein it alleged that the Western Union Telegraph Company (Western Union) owed ITT the sum of $240,566 (amended to $250,537), plus interest, for services which ITT performed for Western Union incident to the handling of overseas messages during the years 1968–1969.

2. Under Section 207 of the Communications Act of 1934, as amended, a civil action for the recovery of money damages for which the carrier may be liable under the Communications Act may be brought in either a Federal District Court or before the Federal Communications Commission. Jurisdiction for the Commission to accept and resolve the complaints are found in Sections 201 and 222 of the Communications Act.

3. The Commission, pursuant to the provisions of Section 4(i), 4(j), 201, 206, 207, 208, 209 and 222 of the Communications Act of 1934, as amended, accepted the ITT complaint, and by Memorandum Opinion and Order (FCC 71–1134), adopted November 3, 1971, released

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November 8, 1971, designated the complaint of ITT, and the complaints of other international carriers, for hearing, authorizing inquiry into the following issues:

A. Based upon applicable provisions of law, Commission rulings and agreements, understandings and arrangements between Western Union and the complainants, what were the respective responsibility of Western Union and the complainants for providing the various operations required in the handling of telex initiated international telegraph service: (1) before May 1, 1968, (2) during the "CD" period from May 1, 1968 to September 30, 1968, (3) during the "direct access" period from October 1, 1968 to October 31, 1969, (4) subsequent to October 31, 1969.

B. Were any operations which should have been performed by Western Union, in fact, partly or wholly performed by any of the complainants during the period May 1, 1968–September 30, 1968, and the period October 1, 1968–October 30, 1969.

C. To the extent that the complainants did, in fact, perform any operations which should have been performed by Western Union, what, in light of all the facts and circumstances, should be the measure and amount, if any, of damages which Western Union should be required to pay to each of the complainants.

The Commission made the Chief, Common Carrier Bureau, a party to the several proceedings between the complainants and Western Union.

4. Prehearing conferences were held on December 10, 1971 and March 24, 1972. Evidentiary hearings were held on June 20, 21, 22, 23, and July 25, 1972. The record was closed by formal order issued August 9, 1972, released August 10, 1972. Proposed findings of fact and conclusions of law were filed by ITT on October 10, 1972, and by Western Union on October 11, 1972. Reply to findings were filed on October 25, 1972 by ITT and by Western Union.

FINDINGS OF FACT

5. International message telegram service is provided jointly by Western Union and the international communications carriers. Western Union gathers outbound international public message traffic from customers within the 48 contiguous states by various accepted methods. These methods included the over-the-counter filing by a customer, message pickup by messenger, receipt of message over the telephone line and tielines of Western Union customers.

6. The term "process," as used herein, refers to the acceptance by the record or telegraph carrier of the message, if tendered in an approved or accepted manner, and such other steps as are necessary to classify the message, count and record the number of chargeable words, determine the proper tariff charge, collect or follow accepted procedures to assure collection of the proper tariff charge, forward the telegram to the addressee directly or through another carrier, and such other functions as are necessary to keep an accurate record of the telegram, when, where and how handled. In brief, the term

"processing" is the making of an accurate record for the benefit of the sender and the protection of the carrier.

7. The term "service," or "servicing," as used herein, refers to the steps taken by the carrier, either Western Union or the international carrier, to contact the customer to verify the intended wording of the telegram or the accuracy of the address.

8. The term "format," as used herein, refers to the standardized sequence of component parts of the telegram, or message, as put on the circuit for transmission. For many years, Western Union has utilized a format which is compatible with its own reperforator switching system. This permits automatic switching within the Western Union landline system. This Western Union format is often referred to herein as the domestic format. The CCITT format, adopted in 1965, which is used by ITT and, in general, by all international carriers, is not now, and has never been, compatible with the Western Union reperforator switching operation. Thus, Western Union and ITT, in offering joint international telegraph message service, are required to convert the messages from the domestic to the international format, or from the international to the domestic format, depending on the point of origin of the message.

9. In the early 1960's, the outbound international telegram, on receipt by Western Union, was processed and, in the Western Union domestic format, was put on the Western Union circuits which took the telegram, if routed, to the specified international carrier, otherwise to the International Quota Bureau.

10. The Western Union domestic format and the ITT international F–31 format, when typed on a machine which generates a perforated tape, employ an activating signal, or electric impulse, to (a) gain access to a transmitting circuit, (b) start moving the message, and (c) switch to destination. The activating signals on the two formats are not compatible. Both formats employ an activating signal, or electric impulse, to (a) indicate the end of the message, and (b) break the transmitting circuit. The ending, or stop, signals on the two formats are not compatible.

11. For more than a century, telegraph traffic has meant the delivery of the addressee in written hard-copy form, or format, the message entrusted to the carrier for delivery. As this country and most of the civilized world, moved into the automated age, Western Union and the international carriers, engaged in programs of research and development looking toward the elimination of much of the manual handling and its concomitant delay. This research led to the implementation of a new Western Union system wherein inbound international messages in the F–31 format were converted to a format compatible with the Western Union reperforator switching system and automatic form-feed terminal receiving page teleprinters. Several of these devices, known as "format modifier cabinets," were perfected, installed, and began operating in mid-1967. This permitted the incoming telegram to be switched onto the Western Union circuits without manual handling.

OUTGOING MESSAGE HANDLING PRIOR TO JANUARY 1, 1966

12. For some time before 1966, telegrams transiting the Western Union facilities for overseas points served by ITT, reached the facilities of ITT by one of two routes: (a) the Western Union Kansas City Reperforator Operation; and (b) the Western Union Central Delivery (CD) pneumatic tube connecting the New York City terminal of the Western Union reperforator system and the ITT operating center.

The Kansas City Reperforator Operation

13. An overseas international message, initiated by a telex customer of any one of the approximately 1,500 Western Union Company operated offices throughout the 48 contiguous states, was fed into the reperforator system, where, in the domestic Western Union format, it would be transmitted to a local reperforator center and switched to the Kansas City reperforator center. At Kansas City, the message would be switched by tape to the New York offices of ITT, where ITT personnel would remove the message from the receiving teleprinter, perform certain functions, including the converting of the message to the international F–31 format, perforate the message on tape, and feed the tape into the ITT computer system for transmission overseas.

The Western Union "CD" Pneumatic Delivery Operation

14. The Western Union "CD" office at 26 Broadway, New York City, was located a short distance from the New York offices of ITT and other international carriers. The several offices were connected by means of pneumatic tubes. Initially, this traffic consisted of international telex messages which had entered the Western Union reperforator system, been processed at a Western Union office, but through error directed to the Western Union "CD" office at 26 Broadway, New York City, rather than to the Kansas City office. These messages were received in New York on a form-fed page printer. After receipt, the paper was torn from the printer, passed to the international transfer desk for transmittal via the pneumatic tube to the ITT offices at 67 Broad Street, New York City. When this paper was received, ITT personnel would scan, convert to F–31 format, and carry to the proper computer for transmission overseas.

15. When the customer specifies the international carrier for overseas transmission, such preference, in most instances, is honored. When, however, the customer does not specify his preference for the forwarding carrier, the telegram is sent to the International Quota Bureau, which distributes such messages among the international carriers in accordance with the terms of the International Quota. These Quota Bureau-distributed messages were sent direct to the Western Union "CD" office at 26 Broadway, New York City, and relayed via the pneumatic tube to the then identified international carrier.

16. It should be noted that prior to January 1, 1966, international messages routed "via ITT" as well as those messages assigned to ITT by the International Quota Bureau, were delivered to ITT in Western Union domestic format as "hard copy," i.e., a readable page, not a perforated tape. After receiving these "hard copy" telegrams, ITT per-

sonnel would convert the message to the international F–31 format; retype or perforate the message on tape, and feed the tape into the computer system for transmission overseas.

OUTGOING MESSAGE HANDLING JANUARY 1, 1966–MAY 1, 1968

17. On or about January 1, 1966, Western Union initiated a procedure wherein certain Western Union central offices, by special telex arrangements, would transmit in F–31 format specifically routed messages to teleprinters in the operating rooms of the specified international carrier. These teleprinters had the capacity to generate perforated tape which would enable onward transmission without retyping. Perforated tape received on the teleprinters in the ITT offices was removed from the teleprinter by ITT personnel and fed, via the ITT ADX computer, into the ITT transmitter for forwarding to the addressee.

18. Western Union insists that this method of handling international messages was started as an experimental operation to test the feasibility of using the international F–31 format. ITT's participation in this method of handling traffic began on May 19, 1966. This service was extended to the twenty-five cities which generated the largest volume of international traffic and is often referred to as the Twenty-five City Operation. Unrouted messages could not be converted to the new procedure because the originating Western Union office would not know which carrier was entitled to receive the message under the Quota system.

19. The Twenty-five City Operation was not successful due to a number of factors. In the F–31 international format, the routings to a particular city or country are indicated by four letter groups known as Destination Indicators (DI), depending on the arrangements overseas. In order to determine the DI routing required for F–31 computer switching, the Western Union operator had to go to a special booklet for each international carrier as the DI's varied from carrier to carrier, and in some instances, from country to country. The shifting to the F–31 format of the few and intermittent messages involved at most of the twenty-five cities, was an extremely difficult transition for even the most experienced Western Union operator. The difficulties led to errors, message look-ups and other problems. In brief, the end product was increased probability of error, low production, and high cost. As the Western Union field offices recognized the problems, an increasing amount of traffic was diverted from the Twenty-five City Operation to direct interconnection through Kansas City and Minneapolis. The Twenty-five City Operation was discontinued in November 1970.

20. On or about mid-1967, Western Union established direct circuits from the Kansas City reperforator office to the ITT operating rooms in New York City. Messages routed "via ITT" by the senders were routed to Kansas City for transmission to ITT, except those sent by means of the Twenty-five City Operation. Tributary offices of Kansas City (offices located in Oklahoma, Colorado, Nebraska, Missouri and Kansas) could select ITT automatically through Kansas City so no

manual switching was required. All other offices could select Kansas City through their own reperforator office and a pushbutton switch would send the message on to ITT. This resulted in improved service as the manual handling in the Western Union "CD" New York office was eliminated.

The Western Union Proposals

21. By mid-1966 the Western Union telex system had grown to some 15,000 subscribers and was increasing at a substantial rate. Western Union began to explore new methods by means of which the transmission of international telegraph messages, both routed and unrouted, could be simplified and made more convenient for the telex subscriber. Western Union proposed a system whereby the telex customer could route outbound traffic via the facilities of the international carrier by dialing a discrete telex number for the specified international carrier and a second such number for the transmission of unrouted messages.

22. The Western Union circuit was to be activated when the telex subscriber dialed the discrete number to route his telegram via ITT, RCA, WUI, or French, as well as the discrete number for unrouted outbound traffic. The activated circuit was to terminate in the New York "CD" office of Western Union at which the message was to be processed before it was transferred in "hard copy" to the international carrier for transmission to the overseas addressee. Stated differently, the Western Union "CD" office was to be the first and only Western Union office to process the outgoing international telegram before it was delivered to the forwarding international carrier.

23. By letter, dated October 3, 1967, Western Union advised the Commission that it had held meetings with the international carriers to discuss and describe the proposal to establish a message center at 60 Hudson Street, with free telex numbers assigned to ITT and other carriers and a free number for unrouted messages and messages originated in the gateway cities. Parts of the proposal read as follows:

> W.U. will forward the routed messages on a direct circuit to the appropriate international carrier in the F–31 format to be terminated at the international carrier's office in equipment of the international carrier.
>
> The anticipated inauguration date of this arrangement is on or about November 1, 1967. . . .

24. By letter, dated November 15, 1967, Western Union described the proposed services, in part, as follows:

> The proposed service comprehends the initial installation in the "CD" New York operating room of 24 Telex receiving printers, six each assigned to RCA, ITT, and WUI, for reception of international messages originating with hinterland subscribers specifically routed by the sender via the respective carrier, plus six for the receiving of unrouted . . . . messages from hinterland subscribers and messages . . . .
>
> Three copy unprinted rolls will be provided for all Telex receiving printers; the original copy manila, the duplicate a distinctive green, and the triplicate salmon. The original will be used for transmission or transfer to the international carrier, the green copy for billing purposes and the salmon copy will be retained for service message handling.
>
> Western Union will provide sufficient circuitry to each of the international carriers to meet the operating and service requirements of the direct transmission of those messages not requiring quota processing. These messages will be

transmitted to the international carriers in CCITT F-31 format, *except as otherwise agreed upon.* (Emphasis supplied)

Service messages involving traffic filed by this method will be handled by Western Union, including the querying and reporting to telex subscribers. Complaint and claim procedures involving all international traffic will remain unchanged.

The telex number 1041 was to be used by the Telex subscriber desiring to route his message "via ITT." Western Union requested the Commission to rule on the question of whether the telex numbers sent by the subscriber did or did not constitute a specific routing of the message within the meaning and intent of the International Quota.

25. By letter, dated November 24, 1967, Western Union furnished the Commission additional information relating to its proposals. In this letter, Western Union stated, in part:

Messages specifically routed to ITT and RCA will be perforated by WU in "CCITT" F-31 format and immediately transmitted direct to their respective operating rooms over two teleprinter circuits to each carrier.

26. Western Union, by letter dated December 7, 1967, invited to the attention of the Commission the fact that the date of December 15, 1967 had been chosen as the "cut-off date" for providing the Telex Directory printer the required layout for publication of information and instruction for the use of the Telex subscribers, and called attention to the fact that the next "cut-off date" was June 15, 1968, for the August 1, 1968 publication of the Telex Directory. Western Union wanted the proposed procedures to begin at the earliest possible date.

27. The Commission, in the matter of *Western Union Telegraph Company* (FCC 68-188; 11 FCC 2d 946, 955, adopted February 21, 1968), issued a declaratory ruling to the effect that the dialing by a subscriber of a telex number assigned exclusively for the filing of overseas messages over the facilities of a particular carrier, as proposed by Western Union, would constitute a specific routing via the selected carrier within the meaning of Section III of the International Formula and that the proposed arrangements would be consistent with the terms of the International Formula. This declaratory ruling laid the foundation for the filing of international telex messages in the manner proposed by Western Union.

28. Due to several and varied circumstances, the proposed new method for the handling of international telex messages did not start until May 1, 1968. Prior to that time, however, Western Union, ITT, and the other international carriers had promoted the new method in the Telex Directory and by other means.

29. In anticipation of a May 1, 1968 start of the new proposed operation, Western Union placed requisitions for equipment, facilities and materials. Recruitment was begun for additional personnel which would be necessary to handle the expected volume of less than 800 messages daily. This additional force was hired and placed in training to ensure their availability by the May 1, 1968 cut-over date. Priority was given to the installation of necessary circuitry and equipment to permit access by the telex subscribers.

30. As the May 1, 1968 cut-over date approached, it became clear that arrangements could not be completed to permit the installation

of equipment and for the onward transmission of messages to the international carriers in the F–31 format. Western Union was thus confronted with the necessity of postponing the inauguration date for the second time or proceed by allowing the telex subscriber to have access to the "CD" center and transfer the traffic to the carriers via the pneumatic tubes and conveyer belts.

31. By letter dated March 14, 1968, Western Union notified ITT that Western Union would inaugurate the proposed service effective May 1, 1968, but would not commence to transfer this traffic to ITT in the F–31 format until June 1, 1968. Western Union was to continue to do the customer billing and all customer relation functions and would provide, at no expense to ITT, the necessary facilities to handle the traffic between the offices.

32. Western Union began operation on May 1, 1968 with the expectation that the initial load would be somewhat below 800 messages daily and would build up slowly. To the amazement of Western Union and others, the load received at "CD" on the first day exceeded 1,000 messages, increased rapidly to over 1,900 on May 10, then settled to a daily level of between 1,600 to 1,750 messages through May, and continued to grow.

33. ITT describes the problems occasioned by the customer acceptance of the new service essentially as follows: The volume of messages was greatly in excess of the number anticipated based on a sampling survey made by the Western Union comptroller. The Western Union "CD" office was "inundated" daily. ITT contends that Western Union did not fully process the incoming messages, that many of the Western Union word counts were found to be incorrect. ITT, unwilling to rely on the harried Western Union "CD" office staff re-word, counted the messages.

34. ITT asserts that the functions performed by its staff with respect to the 1041 messages received via the pneumatic tube were: (1) extract hard copy from tube carriers; (2) microfilm copy; (3) count words; (4) record word count on messages; (5) apply destination, accounting origin, and precedence and tariff indicators to message; (6) sort messages according to whether full-rate or night letter; (7) convert message into F–31 format and perforate it into a tape; (8) feed tape into computer; (9) time stamp message; (10) file messages; (11) prepare service messages; (12) supervision.

35. It was immediately clear to Western Union that the number of terminating printers was inadequate for the over 100% increase in the anticipated load, and orders were placed on May 2, 1968 to augment the existing acceptance telex equipment and circuitry. The staff sufficient to handle a maximum 800 daily messages, even without F–31 formating, was inadequate for the volume that did develop, and Western Union, was, therefore, unable to institute transmission to the international carriers in F–31 format.

36. It was also evident to Western Union that additional staffing was required but the acquisition of additional personnel was severely hampered by the conditions existing at that time in the lower Manhattan financial district where the "CD" office was located. The labor market was restricted because of competition for teletype operators

from the international carriers, brokerage firms and others. New hires required approximately ten weeks of training prior to job assignment. Upon placement at an operating position, a new employee's production was low for several months. As a result of these conditions, coupled with the unexpected rapid increase in volume, Western Union found it impossible to meet the demands upon its "CD" operation for processing the telex-originated messages for transfer to the carriers by the methods originally envisioned.

THE DIRECT ACCESS PERIOD—OCTOBER 1, 1968 TO OCTOBER 31, 1969

37. Western Union and those international carriers which were receiving messages via the Western Union "CD" office, recognized that while the dialing of a discrete number to gain access to the Western Union "CD" office had great customer acceptance, this acceptance placed demands on Western Union which could not be handled properly at that time. An alternative to the "CD" access method had to be found.

38. On July 17, 1968, a joint meeting was held between key officials of Western Union, ITT, RCA and WUI. This meeting, which followed several discussions between the carriers, ended with a suggestion that Western Union submit to the involved international carriers a proposal for a three month trial period of "direct access" to the facilities of the international carriers.

39. Following the July 17, 1968 meeting, Western Union, by letter dated July 23, 1968, wrote to ITT, RCA and WUI, stating in part, as follows:

> Western Union proposes that for a period of three months beginning as promptly as possible the following arrangements be made effective:
>
> 1. Direct connection arranged for unattended operation will be established to the international carriers' operating rooms for the reception of out-bound international messages directly from domestic telex subscribers. All messages specifically routed by the subscribers via the specified telex numbers to be terminated at the international carriers' offices. The unrouted messages will continue to be handled at the "CD" New York. These connections and terminating equipment will be provided by the domestic carrier at no cost to the international carriers and their use by the subscribers will be handled as free calls without pulse charges.
>
> 2. Western Union will provide two telex subscriber stations to each international carrier for the purpose of handling service messages via the domestic telex network directly to the originating telex stations. These units also will be provided at no cost to the international carriers and the service calls also will be without pulse charges when used for this purpose.
>
> 3. Western Union will continue to perform all of the necessary billing and accounting work for this traffic. Copies for this purpose will be obtained by Western Union from monitor printers in its own office.
>
> 4. There will be no change in the present authorized domestic landline per word charges for this traffic. But, out of such charges during the trial period, Western Union will compensate the international carriers for the performance by them of certain of the work which would ordinarily be performed by Western Union. Such operations are as follows: (a) For the labor involved in call-backs and service correspondence with the telex patrons on messages sent by them. Preliminary and very approximate figures indicate this cost to average 1.3¢ per message received. (b) *Any difference* in cost between receiving this traffic directly from telex patrons and the cost of accepting it by usual intercarrier wire operation, the costs for which are included in

the authorized per word landline haul rates. This is one of the matters to be evaluated during the three months' trial, but we are willing during the trial period to arbitrarily fix the compensation for this function at 5.7¢ per message. The total reimbursement to the international carriers during this trial period would thus be 7¢ per message.

Such compensation will not serve to modify either the telex or the landline haul provisions; it will simply constitute an agreement between Western Union and the individual carriers providing for reimbursement of the international carriers for work which they will be doing in our behalf at the rates stated in the foregoing sub-paragraphs (a) and (b).

5. The above arrangements will be established on a temporary basis for approximately 90 days during which time the international carriers and Western Union will attempt to mutually agree to a satisfactory compensation arrangement if the direct access method is continued beyond the trial period.

As I indicated to the international carriers at the joint meeting, Western Union is presently looking into the possibility of handling this traffic through the use of interim computer techniques pending the development and implementation of an overall plan for handling international traffic under Western Union's modernization program. As I explained to you, the full implementation of the domestic modernization program will take at least two years. Any arrangement now made effective for direct access by telex subscribers to the international carriers is subject to change as the modernization plan develops.

In the event the interim computer handling method is feasible, Western Union will discontinue the direct telex connections at the end of the trial period or earlier, and transfer the traffic to the international carriers via the computer. There may also be other alternate methods proposed by any of the carriers to consider.

40. By an agreement dated September 17, 1968, Western Union and other international carriers, including ITT, sought to resolve the operating difficulties substantially as follows: For a period of three months beginning September 30, 1968, Western Union would disconnect its telex machine then in the Western Union New York office and relocate them in the offices of the specified international carriers. The telex customer, by dialing the specified telex number, was to be connected to the receiving teleprinters located in the office of the selected carrier. Unrouted outbound international messages were to be handled at the Western Union "CD" office in New York.

Western Union also agreed that:

Western Union will initially provide two Telex subscriber stations to each international carrier . . . for the purpose of handling service messages via the domestic Telex network directly to the originating Telex station, such stations to be provided by Western Union at no cost to the international carriers and when the stations are used for service calls such calls also will be without pulse charges.

Western Union will continue to perform all the necessary billing and accounting in connection with this traffic.

During the trial period or until other operational billing or accounting arrangements are agreed upon by the parties or ordered by the Federal Communications Commission (Commission), the present divisions of charges shall be maintained, provided, nevertheless: a) Such divisions shall be the subject of good faith negotiations to commence promptly, between Western Union and each of the international carriers, looking to the establishment of retroactive financial arrangements appropriate to the operational, billing or accounting arrangements in effect commencing September 30, 1968 (including any continuance of such arrangements) or to any subsequent changes therein and, to the extent necessary, shall be subject to the approval of the Commission; b) Should the parties hereto fail to agree as to the financial, operational, billing or accounting arrangements during the aforesaid three (3) month period, or the continuance of the arrangements herein set forth beyond the three (3) month period, any of the parties may pursue such course as it may deem appropriate.

Western Union did not process any of the outbound international messages which were delivered to ITT during the "Direct Access" period. The only processing on these messages was done by ITT.

41. Due to the volume of outbound telegrams and the shortage of personnel trained in processing such traffic, the problems with which Western Union was confronted were not overcome within the three months beginning September 30, 1968, but continued through October 31, 1969. On November 1, 1969, Western Union began to send its outbound international traffic through the Western Union facility at Greensboro, North Carolina, where trained and experienced personnel were able to convert the telegram from the domestic Western Union format to the international F–31 format before it was delivered to the international carrier for onward transmission to the addressee.

42. ITT, in its original and amended complaint, asserts that despite the promise of Western Union to deliver international telex messages in the F–31 format, such job was never performed throughout the period when domestic telex subscribers had their messages routed via the Western Union "CD" office; that while Western Union performed functions such as word counting and service work with customers, other operations were handled by the international carrier; that many operations performed by ITT for Western Union required expenditures for additional services of operators, routers, service writers, searcher/filers and supervisors.

43. ITT also alleges that during the "Direct Access" period—October 1, 1968 through October 31, 1969—it was necessary to use ITT operators for sending, receiving and customer call-back services and employ counting clerks, routers, service writers, searchers, searcher/filers and supervisors, for services which should have been done by Western Union.

44. ITT states that the claims for reimbursement, as summarized, are for the labor required to handle the telex messages and that administrative, general, and other indirect costs (e.g., rent, utilities, etc.) are not included in the claims made.

45. The details of the original and amended claim of ITT for reimbursement services performed are summarized as follows:

	CD period	Direct access	Total
Original complaint	$35,475	$205,091	$240,566
Amended complaint	38,935	211,602	250,537
Operators:			
Receiving		526	
Sending	559	964	
Customer callback		48	
Counting clerks		578	
Routers	230	319	
Service writers	297	436	
Searcher/filers	139	269	
Supervisors	214	220	
Pickup clerks	125	139	
Subtotal	1,564	3,499	
Fringes	[1] 207	[2] 497	
Total average weekly cost	1,771	3,996	

[1] 15 percent.
[2] 15.5 percent.

In the amended complaint, the breakdown of messages handled and the cost per message is shown as follows: "CD" Period, 86,524 messages handled—cost $0.45 per message, "Direct Access", 325,541 messages handled—cost $0.65 per message.

46. The ITT Exhibit 2 which contains the basic data on which the above weekly costs are based, establishes that in handling the "CD" traffic and the "Direct Access" traffic, ITT personnel classified as "Routers," would count the words in each message, apply destination, origin, precedence, tariff indicators, and sort according to whether "full-rate" or "night letter." Personnel classified as "Operators" (sending) would convert message into F–31 format, manually perforate into a tape, feed the tape into the ADX computer for further transmission, time stamp message, and place in file box. The ITT exhibit, thus, establishes that a part of the total ITT claim is for services performed in forwarding the messages after they had been received from Western Union.

47. ITT asserts that it is entitled to claim full reimbursement for all the out-of-pocket expenses above referred to for the reason that Western Union, in discussions with the international carriers and in letters to the Commission, had agreed to deliver the messages to ITT and other international carriers in the F–31 format.

48. Western Union admits that it is liable to ITT for certain expenses performed by ITT personnel on behalf of Western Union but limits this obligation to the expenses incurred by ITT in servicing the incoming Western Union telegrams to the extent of performing work "which would ordinarily be performed by Western Union." Western Union thus agrees to reimburse ITT for (a) call-backs and service correspondence with the telex patrons on messages sent by them, and (b) the difference in cost between receiving the traffic directly from the telex patron and the cost of accepting it by usual inter-carriage wire operation, the costs of which are included in the authorized per word landline haul rates.

49. Payment has been received by the carriers for the transmission and delivery of the messages here involved. The resolution of this proceeding will not effect what the public must pay for the services in question. The sole matter in issue is the amount of money which Western Union is to pay ITT for rendering services which should have been performed by Western Union.

CONCLUSIONS

1. In this proceeding the Presiding Judge is called upon to decide, under the facts here prevailing, the measure and amount, if any, of damages which Western Union should be required to pay ITT World Communications, Inc., for services which ITT allegedly performed for Western Union.

2. The several issues as framed by the Commission are outlined in paragraph 3 of the preliminary statement.

3. Since the merger of the Western Union Telegraph Company and the Postal Telegraph, Inc. (10 FCC 148) international telegraph service has been provided jointly by Western Union and the international

telegraph carriers. As this country and the civilized world moved into the automated age, the carriers sought means whereby the handling of the telegram, or written message, could be forwarded by the most expeditious method possible. The resulting research led to the design and implementation of the system wherein a message gathered by Western Union within the 48 contiguous states was typed in the Western Union domestic format and sent through a machine which generated a perforated tape. This perforated tape made it possible to route or switch the message to the Western Union office for delivery, or to the office of the international carrier for forwarding to the addressee.

4. The adoption in 1965 of the CCITT F–31 format by ITT and the foreign international carriers, made it possible to route or switch messages in a manner similar to that used by Western Union. The development of the "format modifier cabinets," which were put in operation in 1967, permitted the incoming foreign telegram in the F–31 format to be computer-switched, or converted, to a format compatible with the Western Union reperforator switching system and automatic form-fed terminating receiving page teleprinters. In brief, it had become possible for the foreign international telegraph carrier to send the telegram to the Western Union office for delivery to the addressee without manual handling as it entered the United States.

5. On or about January 1966, Western Union initiated a procedure, pursuant to which routed telex traffic originating with customers of certain Western Union offices would be retyped in the F–31 format and put on a circuit terminating in a teleprinter in the office of the specified international carrier. The teleprinter had the capacity to generate perforated tape which, when fed via the ITT ADX computer into the ITT transmitter, made possible the forwarding of the message without manual handling.

6. The 1967 Western Union proposals to (a) transmit routed telex traffic to the international carrier in F–31 format, and (b) permit the telex customer to route his outbound message by dialing the discrete number assigned to the international carrier, were prompted by the desire of Western Union to promote a more rapid and efficient method of forwarding outbound telex traffic. ITT, and other international carriers, accepted the proposals with this basic understanding. Neither Western Union nor the involved international carriers gave any serious consideration in 1967, or early 1968, to the possibility that the customer acceptance of the new Western Union proposals would be such that the mere volume of incoming messages, all funnelled through the New York "CD" office, would tax severely the ability of Western Union to receive, process and transfer telegrams to ITT or other international carriers.

7. The Commission, on February 21, 1968, adopted a Declaratory Ruling which laid the foundation for the filing of outbound telex messages in the manner proposed by Western Union.

8. The date for the start of the new method of handling the traffic, first scheduled for November 1, 1967, was changed to May 1, 1968. Western Union, ITT, and other international carriers, publicized and promoted the new proposals by various means. Western Union employed additional personnel and ordered more equipment. As the target

date of May 1, 1968 approached, it became evident that Western Union would not be able to transfer outbound traffic in the F–31 format. On March 14, 1968, Western Union notified ITT that the transfer of traffic in the F–31 format would not begin until June 1, 1968.

9. The new method of operation began on May 1, 1968, with the expectation that the initial load would be somewhat below 800 new messages daily. To the amazement of Western Union and the other carriers, the load received at the "CD" office on May 1 exceeded 1,000 messages, increased rapidly to over 1,900 messages on May 10, and thereafter settled to a daily level of between 1,600 and 1,750 messages through May, and continued to grow. The volume was such that the telegrams in "hard copy" inundated the "CD" office daily. Western Union was unable to process these messages, as proposed, and was forced to forward them in "hard copy" by way of pneumatic tubes and conveyor belts.

10. In order to handle the ever increasing volume of international telegraph traffic, ITT, and other carriers, after discussions, entered into an agreement dated September 17, 1968, wherein for a period of "three months beginning September 30, 1968," Western Union was to remove its telex machines from the Western Union "CD" office and relocate them in the offices of the specified international carriers. The telex customer was to gain "direct access" to said machine by dialing the discrete number assigned to the specified carrier. Western Union agreed to "continue to perform all the necessary billing and accounting in connection with this traffic." The charges would be maintained, provided that negotiations were to begin looking toward the establishment of "retroactive financial arrangements appropriate to the operational, billing or accounting arrangements in effect commencing September 30, 1968 . . ." which, to the extent necessary, "shall be subject to the approval of the Commission."

11. The transmission and delivery of an international telegram to and from hinterland customers in the contiguous 48 states requires the cooperation of Western Union, the domestic carrier, and the several international carriers. The carriers are in continuous touch with each other. Plans and proposals are exchanged on a formal, as well as an informal, basis. "Ordinarily, the initiative rests with Western Union to determine, within the confines of the International Formula, the manner in which it will collect and transfer overseas message traffic to the overseas carriers." (*The Western Union Telegraph Company*, Declaratory Ruling FCC 68–188, adopted February 21, 1968, 11 FCC 2d 946, 951). The initiative rests with the international carrier to determine the manner in which it will receive the international traffic and deliver it to the overseas addressee. "The Commission is not interested in creating a straightjacket by which to hamper the industry, but rather in developing basic guidelines within which to operate in such fashion as to spur the competing carriers to develop new services and to improve existing ones while, at the same time, securing for the public high quality of service at the lowest possible rates and thereby carry out the congressional mandate to us." (*The Western Union Telegraph Company*, Docket No. 11953, 25 FCC 535, 581, adopted July 23, 1958).

12. Among the matters which the Commission considers in allocating the division of charges received for the handling of an international telegraph message are (a) the costs to Western Union, the domestic carrier in collecting and transferring the message to the forwarding international carrier, and (b) the costs to the international carrier in receiving, transmitting and delivering the message to the addressee. (*The Western Union Telegraph Company*, Docket No. 11953, July 23, 1958, 25 FCC 535, 555, 641; *The Western Union Telegraph Company*, Docket No. 19036, FCC 71–523, May 12, 1971, 29 FCC 2d 422; *The Western Union Telegraph Company*, Docket No. 17554, *et al.*, FCC 71–697, June 30, 1971, 30 FCC 2d 617).

13. Insofar as ITT was concerned, the heart of the 1966–67 proposals was the offer of Western Union to (a) frame, or type, the outgoing telegram in the F–31 format, and (b) forward the telegram to ITT on a circuit which would terminate in the ITT operating room on a machine which had the capacity to generate perforated tape. This perforated tape was desired by ITT for it could be fed via the ITT ADX computer into the ITT transmitter to forward the telegram to the addressee. This permitted ITT to eliminate one or more manual steps in forwarding the telegram.

14. The proposals advanced by Western Union during the 1966–1969 period were changed, or modified, frequently. Despite the fact that in letters dated October 3, November 15 and 24, 1967, Western Union used the affirmative "W.U. will . . .," or its equivalent, it is clear that neither Western Union, ITT, nor any other carrier considered and treated the Western Union proposals to be firm offers or commitments which Western Union was bound to honor under any and all conditions.

15. The Western Union proposals of the 1966–67 period were made after discussion with ITT and other international carriers. Their purpose was to eliminate one or more manual steps in the forwarding of outbound traffic.

16. The volume of traffic which followed Commission approval of the proposals that the telex customer could route his outgoing message by dialing a discrete number assigned exclusively to the specified carrier, established that the Western Union proposals had wide customer acceptance and were sound.

17. The problems which were encountered by the carriers during the period May 1, 1968 through October 31, 1969, establish that a period of 18 months was required to obtain and install the necessary additional equipment, recruit and train additional operating personnel.

18. The handling on and after November 1, 1969, of outgoing traffic through the Western Union message center at Greensboro, North Carolina, establishes that the outbound traffic can be handled expeditiously in the manner proposed by Western Union in 1966.

19. To require Western Union to reimburse ITT for all costs incurred by ITT resulting from the inability of Western Union to transfer 86,524 outbound telegrams to ITT in F–31 format via "tube," or teleprinter circuits, during the "CD" period, as well as all costs incurred by ITT in receiving, processing and forwarding 321,000 outbound telegrams during the "Direct Access" period, would establish

a precedent which would cause Western Union or any other carrier to have second thoughts before suggesting the initiation of any new procedures unless and until such procedures are so described as to cover in detail the duties and obligations of each carrier in any and all possible situations. Such would inhibit that degree of flexibility which is necessary in the initiation, implementation and perfection of new and improved methods of handling traffic.

20. Costs were incurred by ITT in handling and forwarding the 407,524 plus telegrams during the 18 month period of May 1, 1968 through October 31, 1969. To deny ITT the right to be reimbursed for costs incurred in performing tasks for Western Union, would establish a precedent which would make one carrier reluctant to come to the aid of another should a like, or similar situation develop in the future.

21. As seen by the Presiding Judge, the equities require that costs incurred by Western Union and ITT in handling 86,524 telegrams during the "CD" period, and 321,000 telegrams during the "Direct Access" period, be allocated as follows:

A. Western Union, as the domestic carrier, is to pay all costs associated with the gathering, processing and initial delivery of the telegram to the forwarding international carrier. During the "Direct Access" period, telex customers delivered 321,000 telegrams directly to ITT. This required ITT to process the telegrams, a task which, under normal conditions, was done by Western Union. ITT is to be reimbursed for costs incurred in the initial processing of these 321,000 telegrams.

B. ITT, as the forwarding international carrier, is to pay all costs associated with converting the telegram into the international F–31 format and all subsequent steps required to forward the telegram to the addressee.

22. Western Union will reimburse ITT for all costs incurred by ITT in handling the 86,524 messages during the "CD" period except those costs which are associated with the conversion of the telegram into the F–31 format, the making of the perforated tape and the forwarding of the telegram to the addressee. It is realized that ITT personnel may have and probably did spend time on steps which had been previously performed by Western Union. The volume of traffic which inundated the Western Union "CD" office during the period May 1, 1968 through September 30, 1968, and the conditions under which personnel were working, coupled with the discovery of erroneous word counts, constituted ample justification for ITT to re-do some, possibly all, of the processing which had been done by Western Union personnel.

23. ITT has alleged that during the "CD" period it incurred costs in the amount of $38,935 in performing work on 86,524 telegrams which should have been performed by Western Union. Part of this $38,935 was paid to "routers" and "operators" (sending) who devoted all or part of their time to route, format and forward the telegrams. Such costs are to be borne by ITT. The sums paid for such services are to be deducted from the amount to be paid to ITT.

24. Western Union will reimburse ITT for those costs which were incurred in the initial processing of the 321,000 telegrams handled by ITT from October 1, 1968 through October 31, 1969—the "Direct Access" period. During this period, 321,000 outbound telegrams were received in the offices of ITT, via telex circuits terminating in teleprinters located in the ITT operating rooms. As a result, the initial processing of each telegram, word count and other steps were handled by ITT. As each telegram was in the physical possession of ITT, it should have been put in the F–31 format by ITT personnel when it was processed. ITT is to be reimbursed for costs incurred in processing the 321,000 telegrams, but not for costs associated with (a) putting these telegrams in the F–31 format, and (b) steps taken thereafter to forward and deliver these telegrams to the addressee.

25. ITT has alleged that during the "Direct Access" period it incurred costs in the amount of $211,602 in performing work on 321,000 telegrams which should have been done by Western Union. Part of this $211,602 was paid to "routers" and "operators" (sending) who devoted all, or part of their time to route, format and forward the telegrams. Such costs are to be borne by ITT. The sums paid for such services are to be deducted from the amount to be paid to ITT.

IT IS ORDERED that, unless an appeal is taken to the Commission by any of the parties, or the Commission reviews this Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the rules, the demand of ITT World Communications, Inc. for reimbursement from The Western Union Telegraph Company in the amount of $38,935 for work performed by ITT for Western Union on 86,524 telegrams, IS GRANTED, subject to being reduced in the amount of the costs incurred by ITT to route, format and forward said telegrams to the addressees;

IT IS FURTHER ORDERED that the demand of ITT World Communications, Inc., for reimbursement from the Western Union Telegraph Company in the amount of $211,602 for work performed by ITT for Western Union on 321,000 telegrams IS GRANTED, subject to being reduced in the amount of the costs incurred by ITT to route, format and forward said telegrams to the addressees;

IT IS FURTHER ORDERED that appropriate personnel of Western Union and ITT will examine the records of costs incurred in handling the 407,504 telegrams referred to determine the exact sums to be paid ITT;

IT IS FURTHER ORDERED that ITT and Western Union will file with the Commission on or before March 2, 1973, a statement specifying the amounts paid, or to be paid ITT, pursuant to the above orders. No interest is to be paid on the amount allowed ITT if the payment is made on or before March 2, 1973.

FEDERAL COMMUNICATIONS COMMISSION,
BASIL P. COOPER, *Administrative Law Judge.*

45 F.C.C. 2d

104–029—74——6

FCC 74-220

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF KSLY BROADCASTING CO., LICENSEE OF RADIO STATION KSLY, SAN LUIS OBISPO, CALIF.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted February 27, 1974; Released March 4, 1974)

BY THE COMMISSION:

1. The Commission has under consideration (1) its Notice of Apparent Liability dated May 31, 1973, address to KSLY Broadcasting Co., licensee of Radio Station KSLY, San Luis Obispo, California, and (2) the licensee's response to the forfeiture notice, filed July 25, 1973.

2. The Notice of Apparent Liability for $1,000 was issued because of the licensee's apparent willful or repeated violation of Section 73.123 (c) of the Commission's Rules. On November 6, 1972, the day before the general election, radio stations KSLY, KVEC and KATY broadcast identical items in news programs concerning previous endorsements of certain candidates by the station managers in a Supervisoral election, and urging voters to support the candidates endorsed. It was undisputed that Mr. Homer Odom, the 100% stockholder of the licensee of KSLY, and station manager, and Mr. John Grandy, the majority stockholder of the licensee of KVEC, and station manager, editorially endorsed these candidates prior to the November 6, 1972 item; that although Mr. Robert Brown, manager of KATY, stated he did not editorialize in favor of these candidates prior to November 6, he apparently had publicly endorsed the candidates and broadcast the item in question; and that the identical items broadcast by each station on news programs contained quotes from two of the station managers concerning previous endorsements, and referred to the fact of Mr. Brown's endorsement. We stated in the Notice of Apparent Liability:

> In light of these circumstances it appears that the broadcasts, which stated that all three managers urged voters to support certain candidates, constituted editorial endorsements of those candidates by the licensees. Although last minute editorials are not prohibited, the Commission has stated that such editorials would be patently contrary to the public interest unless the licensee insures that the appropriate candidate or candidates are informed of the proposed broadcast and its contents sufficiently far in advance to have a reasonable opportunity to prepare responses and to have them presented in timely fashion.

3. The statement referred to above was as follows:

> In an unprecedented action by all three local radio stations, KATY, KSLY and KVEC have all urged voters to support Emmons Blake in the Fifth District, Hans Heilmann in the First District, and write-in candidate Clell Whelchel in the Third District. KSLY manager Homer Odom said, "When the *Telegram-Tribune* endorsed Blake's opponent because Blake refused to yield to pressures of the paper we thought things had gone far enough. We respect Blake for standing up to that sort of political blackmail." KATY manager John Grandy said, "We disagree with the *Telegram-Tribune* on almost everything and we particularly resent the blatant attempts by the paper to pressure candidates to accept the paper's point of view. We think Blake, Heilmann and Whelchel are experienced, qualified administrators who can do a better job than an unemployed student, a teacher and an inexperienced lady." KVEC manager Bob Brown joined Odom and Grandy in urging voters to elect Blake, Heilmann and Whelchel.

4. The licensees of KSLY, KATY and KVEC were each issued Notices of Apparent Liability in the amount of $1,000. KSLY Broadcasting Co., through its counsel, has submitted a statement, dated July 25, 1973, as to why it should not be held liable and requests reconsideration of the Commission action.

5. KSLY in its petition for reconsideration contends that the financial burden imposed by the $1,000 forfeiture places an economic hardship on the station. In support of this argument, the licensee cites the flooding of the KSLY facilities in January 1969; a change in the licensee's transmitter site in February 1971; expenditures for the purchase by the licensee's 100 percent stockholder, Homer H. Odom, of the interest of a limited partner in July 1971; the Commission's failure to act on a February 1971 petition to allow KSLY to affiliate with the American Contemporary Radio Network, and consequent loss of revenue; and the acquisition of an FM broadcast facility of San Luis Obispo in July 1972.

6. The licensee also raises constitutional objections to the imposition of the forefeiture. It contends that the Commission's ruling inhibits robust debate and "stifles the disposition of a licensee to present controversial programming." There is no obligation, the licensee states, "to provide contrasting viewpoints to silence. Yet silence would be a necessary concomitant were the Commission's ruling in this instance to be a final precedent." The licensee argues that *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969), holds the rights of the viewers and listeners to be paramount over those of broadcasters, but that the instant ruling "would have the effect of limiting information which should be made available to listeners on matters of public importance." Similarly, the licensee argues that "In the case of the *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), the Supreme Court of the United States asserted that the First Amendment objectives were best furthered by free and robust debate," but the instant ruling, rather than encouraging such debate, "has the effect of relegating a licensee to the presentation of the bland and inoffensive."

7. The licensee also challenges the Commission's application of the editorializing rule to broadcasting stations, but not to competing newspapers, as an impermissible denial of equal protection of the First Amendment. It cites *Red Lion Broadcasting Co.* v. *FCC*, *supra*, as indicating that "holdings of the Commission in the Fairness Doctrine

area are premised upon a constitutional assumption of scarcity of available media. In the instant case, there is only one newspaper in San Luis Obispo. There are several radio stations. Yet the newspaper is not subjected to the same Constitutional constraints as are the more numerous radio stations. This results in a denial of equal protection of the laws to station KSLY in that the station's First Amendment expression is more constricted than that of a newspaper. The Commission could not intend such a Constitutional strait jacket."

8. KSLY also urges that reporting of the political endorsements as a news story is protected as part of the broadcaster's journalistic discretion. The licensee cites the concurring opinion of Mr. Justice Stewart in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973), which stated that "if we must choose whether editorial decisions are to be made in the free judgment of individual broadcasters, or imposed by bureaucratic fiat, the choice must be for freedom." *Id.*, at 146. The licensee states that the local newspaper gave repeated editorial endorsements to four candidates running in opposition to those endorsed by the licensee; that "extensive coverage of that local newspaper's endorsement of the opposing candidates was given by KSLY"; that the "news story about the radio stations' editorial position was a news story in exactly the same sense that the KSLY news stories about the newspaper's endorsement of the opponents were news stories"; that on the morning of the election, "KSLY published news of every editorial position of four newspapers with regard to the Presidential election and 22 state ballot measures"; that "in the case of the San Luis Obispo *Telegram-Tribune*, KSLY also published *again* the local newspaper's endorsement of the four candidates opposing the three candidates identified with the radio stations"; and that the station reported the newspaper's stand on the two county ballot measures. The licensee also argues that "imposition of this forfeiture is inconsistent with the overall shift towards deregulation of radio."

9. The key issue herein is whether what was broadcast constituted an editorial by a licensee endorsing legally qualified candidates for public office under Section 73.123(c) of the Commission's Rules. The licensee claims that our ruling in the Notice of Apparent Liability that the broadcast constituted such editorial was arbitrary and capricious. However, it has advanced no persuasive arguments to overcome the facts which lead us to only one conclusion—the broadcast was a licensee editorial in the guise of a news item. Mr. Odom, prior to the broadcast of the so-called news item, had endorsed editorially the candidates mentioned therein; identical items were broadcast by the three stations, each of whose managers were on record as endorsing the candidates in question; *quotes* from two of the managers (Messrs. Odom and Grandy) were contained in the item; and the substance of the item was that all three managers were urging voters to support certain candidates. As we stated in *Colby Broadcasting Corporation* (*WJOB*), 32 FCC 2d 285 (1971):

> While the remarks that . . . [the] president [of the licensee] made may not have been labelled as a station editorial, we feel that when the president and

> controlling stockholder of a licensee . . . endorses candidates for public office, such endorsements are indistinguishable from a station editorial within the meaning of Section 73.123(c).

10. The licensee claims that the item was broadcast in the exercise of its news judgment. We should emphasize that Section 73.123(c) does not prohibit licensee endorsements of candidates. It imposes certain obligations on licensees who choose to endorse. Licensees cannot escape these obligations by broadcasting such endorsements in the guise of "news." As the Supreme Court stated in *Red Lion Broadcasting Co., supra:*

> There is no question here of the Commission's refusal to permit the broadcaster to carry a particular program or to publish his own views . . . Such questions would raise more serious First Amendment issues. But we do hold that Congress and the Commission do not violate the First amendment when they require a radio or television station to give reply time to answer personal attacks and political editorials. *Id.* at 396.

11. The licensee also contends that the Commission's ruling inhibits robust debate and limits "information which should be made available to listeners on matters of public importance," and consequently constitutes an abridgement of the licensee's First Amendment rights, citing *Red Lion Broadcasting Co., supra.* We believe that *Red Lion* fully supports the action taken herein. As stated therein:

> Believing that the specific application of the fairness doctrine in *Red Lion*, and the promulgation of the regulations in *RTNDA*, are both authorized by Congress and *enhance rather than abridge the freedom of speech and press protected by the First Amendment*, we hold them valid and constitutional. *Id.* at 375 [Emphasis added.]

12. We need not rule on licensee's assertion that the application of the fairness doctrine to broadcast stations, but not to newspapers constitutes a denial of equal protection of the First Amendment. That matter was settled in *Red Lion* and no further comment is necessary. See *Red Lion* at 388–394.

13. As to the licensee's contention that imposition of this forfeiture is inconsistent with the shift towards "deregulation of radio," it should be understood that the Commission's present "*re*-regulation" efforts are aimed at simplifying existing Rules, bringing them up to date in light of technological and other developments, and eliminating requirements which no longer appear necessary. The re-regulation program has not dealt with any aspect of the fairness doctrine, which is being treated in the Commission's special inquiry into that subject, on which a report will be released soon.

14. With respect to the contention that the financial burden imposed by the forfeiture places an economic hardship on the station, we considered the financial condition of the licensee in determining the amount set forth in the Notice of Apparent Liability and the licensee has furnished no persuasive information to warrant reduction of this amount.

15. In view of the foregoing, IT IS ORDERED, That KSLY Broadcasting Company, Inc., licensee of Radio Station KSLY, San Luis Obispo, California, FORFEIT to the United States the sum of one thousand dollars ($1,000) for willful violation of Section 73.123

(c) of the Commission's Rules and Regulations. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument drawn to the order of the Federal Communications Commission. Pursuant to Section 504(b) of the Communications Act of 1934, as amended, and Section 1.621 of the Commission's Rules, an application for mitigation or remission of forfeiture may be filed within thirty (30) days of the date of receipt of this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-198

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of LEASED CHANNEL RATES FOR INTERNATIONAL SERVICES	Docket No. 19947

NOTICE OF INQUIRY AND NOTICE OF PROPOSED RULEMAKING
(Adopted February 27, 1974; Released March 6, 1974)

BY THE COMMISSION:

1. In *WUI, Inc., Leased Channel Rates Between Honolulu and Hong Kong*, 44 F.C.C. 2d—, FCC 73-1272, released December 7, 1973, we indicated that we would examine in a subsequent proceeding the desirability of adopting alternatives to the practice of reviewing, on a route-by-route basis, the lawfulness of Pacific Basin leased channel [1] rates. This arose from our concern as to whether the public interest in reasonable and nondiscriminatory leased channel rates in the Pacific could be efficiently advanced by an approach which would involve less difficulties and expenditures of time, both on the part of the industry and the Commission, than adherence to a route-by-route approach.

2. The route-by-route approach in the Pacific area to leased channel rate regulation appears to have developed as a result of the several Pacific carriers competing among themselves for the leased channel business of the Government and other large users. Since orders for service tend to be for single circuits, or circuits over a specific route, the carriers vie to obtain the order by lowering the rate, with the successful bidder thereafter filing a tariff revision to reflect the lowered rate. Such carriers seek either to justify the new rate under Section 61.38 of our rules (47 CFR § 61.58) or to obtain a waiver of such section, which requires that a detailed cost justification as well as other data be submitted with a tariff revision. While the largest number of such revisions have come in the Pacific, others have occurred on Middle East and South American routes. A detailed examination of the new rate and its justification is frequently urged by the objections of competing carriers to the proposed change. This process involves a considerable amount of time and effort, not only on the part of the carriers but also on the part of the Commission, which could be de-

[1] "Leased channel" service is the international equivalent of what is known domestically as "private line" service. In international service, the bulk of the service is voice grade channels for voice/record use, which permits the customer the flexibility of using whatever portion of the full voice grade bandwidth he wishes for derivation of telegraph grade circuits. This type of leased channel service is offered from the Mainland principally by the international record carriers. Leased channels of greater and lesser capacity are also offered.

voted to other matters should another approach to leased channel ratemaking be developed.[2]

3. Both in the Pacific and elsewhere, the largest single customer for voice/data leased channel service has been the United States Government, both for military and civilian agencies.[3] Because of the nature of the service, the remaining customers generally are organizations which have need for large amounts of communications with particular overseas points. Unlike public telegraph and telex users, therefore, the relatively few customers for leased channel service are better able to bargain with the carriers in connection with the rates and other aspects of the service. For example, the Department of Defense put out bids for service, and the carriers generally compete among themselves to win the award, in the process frequently cutting the rates or offering other ancillary advantages. This situation suggests that in the leased channel areas, detailed rate regulation, designed to compensate for unequal bargaining positions between a carrier and its customers, may be both unnecessary and inappropriate.

4. Indeed, the evidence we have before us suggests that we may be near the point where the carriers are bidding for srevice with rates which reflect little or no return on capital. In such cases, our concern is not to protect the leased channel users from unduly high rates, but rather to assure ourselves that the leased channel rates are not so low as to result in cross-subsidization by other services or undue discrimination.[4]

5. In W*UI, Inc.* above we accepted the argument of WUI that its proposed lowered rate for Hawaii/Hong Kong leased channel service was within a discernible area pattern between Hawaii and Far East points, and also noted that there already existed something of an area rate pattern between Mainland United States and non-U.S. Pacific points. In that decision, we considered the possibility, pending the outcome of this proceeding, of an area ratemaking approach for Pacific leased channel rates although we did not articulate its rationale. Area ratemaking is not new either to this or other regulatory Commission; it exists with respect to leased channel rates between the United States and the greater portion of Western Europe; and it exists in part today with respect to the overseas telegraph message srevice and overseas telex service.[5] In all of these instances, we have consistently main-

[2] The provision of leased channel service has become, within the recent past, a more and more important aspect of the international record carriers' operations. Whereas in 1961 leased channel service revenues accounted for only about 10% of total international record revenues, for 1970 they accounted for almost 25%. By December 31, 1973 the U.S. overseas record carriers had 873 equivalent voice grade circuits in operation for all services from the U.S. Mainland to all destinations, 574 of these, or 66% of the total, were voice/record leased circuits. In the Pacific Basin alone, the U.S. record carriers had 206 circuits for all services out of the Mainland, 163 of which were voice/record leased circuits, or 79% of the Pacific total.

[3] As of June 30, 1973, the U.S. Government was taking slightly more than 25% of all leased channel circuits provided by the record carriers. At the same time, however, the U.S. Government was responsible for almost 50% of the IRC's total leased channel revenues.

[4] Preliminary analysis suggests that the industry as a whole is earning a rate of return on leased channel service well below that for overall operations. For the years 1970–72 a rough calculation shows the IRC's earned in the neighborhood of 6% on such service, whereas overall earnings for the record industry as reported by it and developed by the staff, produced a significantly higher return.

[5] See also the leading case on the propriety of such an approach, Permian Basin Area Rate Cases, 309 U.S. 727 (1968).

tained that cost is the basic criterion of the lawfulness of rates, but have recognized that the lawfulness of an individual rate may turn on more than the particular costs attributable to the route in question. Thus, we have recognized that not only may other ratemaking factors be involved, but we have allowed route cost to be merged with estimated costs of other routes to develop a uniform charge, where it appears that such an approach had merit which overrode the principle that each route should bear a rate directly related to the costs of providing service over such a route. Moreover, the cost of communications satellite services, which contribute an increasingly significant part of overseas transmission services, are to some degree insensitive to distance [6] and the unit costs of distance-sensitive cables are dropping dramatically so that they are becoming a smaller and smaller component of total costs. When we issued our recent decision in connection with the Hawaii-Hong Kong rate reduction cited above, we had in mind essentially the area ratemaking approach for the Pacific Basin. However, we are now of the view that any Inquiry should not confine itself to Pacific Basin rates, but should consider all international leased channel service.

6. On the other hand, it should also be recognized that area ratemaking poses certain distinct hazards of its own. Perhaps the most elementary is the intrinsic danger of undue cross-subsidy between routes or other forms of unlawful discrimination. Another danger lies in the possibility that the aggregation of all area costs will obscure inefficiency or stimulate or impede the growth of traffic on the basis of improperly or imperfectly recognized cost and demand factors. Nevertheless, we believe the potential advantages warrant close exploration of the issue on the basis of industry submissions and staff analysis.

7. We note, however, that in dynamic markets, especially such as exist presently in the overseas telecommunications field, where demand and cost characteristics are constantly changing, service categories and rate structures, especially uniform ones, can soon become obsolete. This in turn might encourage inefficient carrier investment, block service to customers who could be served profitably, thwart consumer choice and the development of new communications uses, and even retard the introduction of new technology. In truly competitive international private line markets there would be a constant industry probing into the changing character of the market; such probing might result in extended consumer choice to meet the new demand characteristics. This suggests that it may be appropriate to treat leased channel service differently from other services for ratemaking purposes; it may be that all the necessary ingredients are present to warrant cutting leased channel service free from cost of service rate of return regulation, and to permit the carriers to set their rates for the service solely on the basis of ordinary competitive considerations. In such a regime, of course, the expense and investment attributable to leased

[6] Note, however, that unit costs of satellite transmission are decidedly sensitive to the loading factor inasmuch as the total volume of traffic flowing through a particular earth station serving a particular area has a market effect on the unit costs of such traffic. To a lesser extent this is true of routes, insofar as earth station and satellite capacity is allocated to a particular route.

channel services would have to be separated and with respect to such investment and expenses the carriers could not look to this Commission for any particular authorized level of earnings or return.

8. Of course, there are dangers and pitfalls which must be carefully examined before a determination can be made with confidence whether the public interest would be served by removing leased channel services from the traditional form of rate regulation. These dangers and difficulties include the complex and to some extent judgmental allocation efforts which must be made to properly separate costs. Before such a departure from the present approach could be adopted, we would need to be satisfied that there truly is a competitive market and that the absence of regulation would not lead to increases in the price of the leased channel service to an unreasonable and unjustifiable level. Furthermore, if there is really a competitive market for leased channel service which would operate to keep the rates therefor even lower than they now are, we would have to consider whether the carriers' operating results in this respect would dispose them against rate reductions in their other services which might otherwise be justified.

9. We do not at this point know whether the de-regulation of leased channel service would, on balance, serve or disserve the public interest and we are accordingly calling on the parties named herein, and any other interested member of the public, to express their views and provide such data as is deemed pertinent to the issues presented. We would be particularly interested in any views as to the desirability, feasibility, and possible structuring of any pilot or experimental program in rate de-regulation which might permit both industry and the Commission to collect and evaluate data under actual operating conditions prior to any final determination of this matter.

10. Each respondent herein shall, irrespective of the proposal it makes, give a complete rationale for its view, indicating the disadvantages as well as the advantages with respect to the theoretical and practical aspects of any particular approach to ratemaking. In connection with approaches other than de-regulation, each respondent shall indicate the manner of determining the reasonableness of rate levels, that is, whether rates should be established on a fully-allocated or other cost basis (whether a route-by-route, area, or other approach is taken), other considerations which should enter into the determination of rate levels, and the cost components, (including the method of compositing cable, satellite and other media) and manner of their derivation.

11. We are not herein, however, concerned at this time with the relationship of voice/grade leased channel rates with channels of other than voice grade bandwidth such as telegraph grade or wide-band. Moreover, we stress that we are not herein contemplating any change in our policy regarding integration of Hawaii/Mainland leased channel rates with the domestic rate pattern. These rates are to be considered herein but will also be treated separately in another context. Nor are we concerned in this proceeding with setting rate levels, a separate and highly complex issue more adequately explored in a separate proceeding. It should therefore be obvious that this proceeding will not result in a prescription of rates or even Commission ap-

proval of carrier initiated rates except insofar as a methodology of ratemaking is involved. The respondents should therefore concentrate their comments on questions of ratemaking principles and not on particular dollar amounts, although reference to specific amounts by way of illustration or comparison is perfectly appropriate. While we are not necessarily convinced at this time that Section 61.38 of the Rules or any other section of the rules requires modification to accommodate any different ratemaking approach, we are nevertheless prepared to consider appropriate modifications of the rules.

12. A word should be said about the framework in which we are undertaking this study. It is not our purpose herein to establish principles by which price competition between the carriers will be elimnated or even reduced since such competition is one of the most important reasons for the existence of more than one carrier. Nor does our action herein in any way affect the obligations imposed on the carriers in other Commission decisions to adjust their rates in the future to reflect the lower costs of modern, high capacity facilities.[7] Rather it is our sole purpose herein to explore the merits of various approaches to ratemaking for leased channel service.

13. Finally, by discussing area ratemaking and de-regulation, we do not intend to imply that we are, at this juncture, inclined to adopt either approach; on the contrary, we are simply of the view that the subject of international leased channel ratemaking is ripe for review and analysis. Accordingly, we encourage all participants to suggest any other approach (including retention of the present one) which they believe would best serve the public interest. It may be, for example, that some combination of the area and route-by-route approach is most appropriate to the present situation.

14. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 201, 204, 205 and 403 of the Communications Act, that an Inquiry and Notice of Proposed Rule Making is hereby instituted to determine the appropriate ratemaking approach for international leased channel service and the points or areas to which this approach should apply:

15. IT IS FURTHER ORDERED, That no later than May 14, 1974, all parties should submit written comments addressed to the following points:

1. Should some or all leased channels for international service (including the off-shore points) be freed from traditional rate of return/cost of service regulation? If so, how, and to what extent should such services be regulated, or should the rates for these services be allowed to seek their own level on a competitive basis?

2. If leased channel rates are to continue to be regulated on the traditional rate of return/cost of service approach, should such rates be set on the basis of: (a) route-by-route cost factors; (b) area-wide cost factors; (c) a combination of (a) and (b) above; (d) fully allocated or incremental costs; (e) compositing principles; or (f) some other approach(es) to ratemaking.

3. What changes, if any, in the provisions of Section 61.38 of the rules, or any other provision thereof, are necessary or desir-

[7] E.g., AT&T (TAT-5) 13 F.C.C. 2d 235 (1968); Transpac II, 43 F.C.C. 2d 505 (1973).

able to effectuate the recommendations submitted in response to questions 1 and 2 above?

In accordance with Section 1.419 of the Commission's Rules and Regulations, an original and 14 copies of all comments and replies shall be furnished the Commission. Responses will be available for public inspection during business hours in the Commission's Docket Reference Room at its headquarters in Washington, D.C.

16. IT IS FURTHER ORDERED, that reply comments shall be submitted no later than June 14, 1974 and shall be served on all parties who submitted initial comments. All relevant and timely comments and replies will be considered by the Commission. In reaching its decision in this proceeding the Commission may, in addition to the specific comments invited by this notice and any replies thereto, take into account other relevant information before it; and

17. IT IS FURTHER ORDERED, That American Telephone and Telegraph Co.; French Cable Corp.; Hawaiian Telephone Co.; ITT World Communications Inc.; RCA Global Communications, Inc.; TRT Telecommunications Corp. and Western Union International, Inc. are hereby made parties to this proceeding.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-203

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of LOWLANDS CABLEVISION, INC., CHARLESTON COUNTY, S.C.	CAC-1718 (SC043)
CHARLESTON CABLE TV CO., INC., CHARLESTON COUNTY, S.C.	CAC-2416 (SC051)
For Certificates of Compliance and Requests for Special Relief	

MEMORANDUM OPINION AND ORDER

(Adopted February 27, 1974; Released March 7, 1974)

BY THE COMMISSION:

1. The Commission has under consideration Lowlands Cablevision, Inc. and Charleston Cable TV Co., Inc.'s applications for certificates of compliance to begin cable television operations in the unincorporated areas of Charleston County, South Carolina, a smaller television market. Both systems propose to carry the following television broadcast signals:

WCIV (NBC, Channel 4), Charleston, South Carolina.
WCSC-TV (CBS, Channel 5), Charleston, South Carolina.
WCBD-TV (ABC, Channel 2), Charleston, South Carolina.
WITV (Educ., Channel 7), Charleston, South Carolina.
WTCG (Ind., Channel 17), Atlanta, Georgia.

In addition, Lowlands proposes to carry WEBA-TV (Educ., Channel 14), Allendale, South Carolina, and the new educational television station that is proposed for Channel 16, Beaufort, South Carolina (BPET-444). Carriage of these signals is consistent with Section 76.59 of the Rules, and there is no objection to the signal carriage.[1]

2. Lowlands and Charleston have opposed each other's applications for certification. Charleston alleges that Lowlands has never applied to Charleston County for permission to operate a cable system. In addition, Charleston notes that Lowland's "unauthorized" construction will prejudice the City of Charleston, since under the annexation law of South Carolina, a city may annex any contiguous unincorporated area by a majority vote of the electorate, and there are strong indications that Charleston City is considering annexing the area Lowlands

[1] Lowlands proposes to serve the unincorporated portion of Charleston County contiguous to Charleston, South Carolina, and extending approximately 7 miles south, 6 miles west, and 11 miles north-northwest from Charleston. The portion of Charleston County that Lowlands ultimately intends to serve has approximately 30,000 homes. It will provide a system with a 13-channel capacity. The portion of Charleston County that Charleston Cable proposes to serve has a population of 247,650. Charleston Cable will provide a system with a 54 channel capacity.

proposes to serve. With respect to Charleston Cable's application, Lowlands argues that the application itself demonstrates that Charleston's earlier objection to Lowlands' application was without merit and designed to delay the processing of Lowlands' application by demanding consolidated processing.

3. The Commission takes note of the South Carolina Supreme Court decision, *Richland County State of South Carolina* v. *Palmetto Cablevision, Inc.*, 199 S.E. 2d 168 (September 7, 1973), where the court held that counties in that state do not have franchising powers. The result of this opinion and our decision to consolidate these applications for simultaneous action, at this time, renders moot the objection of Lowlands and Charleston to one another's applications on matters relating to the franchising process. With respect to Charleston's objection to Lowlands' application on grounds that the city of Charleston may in the future annex the area Lowlands proposes to serve, we note merely that local annexation is a local matter and not one that the Commission will consider. There being no necessity to consider further the objections of the parties, we may proceed to the merits of the applicants' requests for special relief.

4. In the absence of franchises, both applicants have proposed to operate their systems in compliance with the provisions of Section 76.31 of our Rules:[2] significant construction will be accomplished within one year; initial subscriber rates will be consistent with industry-wide standards and no increase in rates will be made without full notice to system's subscribers; procedures will be established to resolve subscriber complaints; a local business office will be maintained and any subsequent modifications of Commission franchise standards will be observed. We find these assurances to be an acceptable alternative proposal to assure compliance with the policies of Section 76.31 of our Rules. *See Television Communications Corporation*, 41 FCC 2d 945 (1973). Consistent with our practice in similar cases we shall certify both proposed systems until March 31, 1977.[3] However, we find that Charleston Cable has failed to specify which areas it proposes to serve within the unincorporated area of Charleston County. As we have noted this day in a companion decision, *Palmetto Cablevision, Inc.*, FCC 74-202 —— FCC 2d ——, the Commission must be informed of the specific areas to be served. Accordingly, while we grant Charleston's application, we shall withhold the certificate pending this notification.

Accordingly, IT IS ORDERED, That the "Conditional Opposition of Charleston Cable TV Company, Inc." filed by Charleston Cable TV Company, Inc., on February 9, 1973, IS DENIED.

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[2] In the *Reconsideration of the Cable Television Report and Order*, FCC 72-530, 36 FCC 2d 326, we stated that in a situation where there is no "franchise or other appropriate authorization" available for the cable operator to submit in his application for a certificate of compliance, the Commission will deal with the situation on a case-by-case basis through the special relief provisions of Section 76.7 of the Rules.

[3] E.g., *Mahoning Valley Cablevision*, FCC 73-347, 39 FCC 2d 939. These grants are made subject to any further orders of the Commission designed to resolve general problems inherent in non-franchised cable operations, or to address any special problems that may be brought to the Commission's attention involving cable operations in the subject communities.

IT IS FURTHER ORDERED, That the "Objection to Application for Certificate of Compliance" filed by Lowlands Cablevision, Inc. on May 30, 1973, IS DENIED.

IT IS FURTHER ORDERED, That the "Application for Certificate of Compliance and Request for Special Relief" filed by Lowlands Cablevision, Inc. on December 11, 1972, IS GRANTED and an appropriate certificate of compliance will be issued.

IT IS FURTHER ORDERED, That the "Application for Certificate and Request for Waiver" filed by Charleston Cable TV Co., Inc. on April 23, 1973, IS GRANTED and an appropriate certificate of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-200

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
MONROE ALL-CHANNEL CABLEVISION, INC., BLOOMINGTON, IND.	CAC-245 IN034
MONROE ALL-CHANNEL CABLEVISION, INC., SPECIFIED PORTIONS OF MONROE COUNTY, IND.	CAC-246 IN058
For Certificates of Compliance	

MEMORANDUM OPINION AND ORDER

(Adopted February 27, 1974; Released March 7, 1974)

BY THE COMMISSION:

1. Monroe All-Channel Cablevision, Inc., operator of cable systems at Bloomington, Indiana, and in Monroe County, Indiana, both located within the Indianapolis-Bloomington, Indiana, major television market (#16), has filed for certificates of compliance seeking to add WGN-TV (Ind., Channel 9), Chicago, Illinois. Oppositions to these applications have been filed by Indiana Broadcasting Corporation, licensee of Station WISH-TV, Indianapolis, Indiana, and Sarkes Tarzian, Inc., licensee of Station WTTV, Bloomington, Indiana. McGraw-Hill Broadcasting Company, Inc., licensee of Station WRTV, Indianapolis, Indiana, filed a statement of support for the "Objection of Indiana Broadcasting Corporation Pursuant to Section 76.17." Monroe presently provides the following television broadcast signals:[1]

WRTV (NBC, Channel 6), Indianapolis, Indiana.
WLWI (ABC, Channel 13), Indianapolis, Indiana.
WISH-TV (CBC, Channel 8), Indianapolis, Indiana.
WTTV (Ind., Channel 4), Indianapolis, Indiana.
WTHI (CBS/NBC, Channel 10), Terre Haute, Indiana.
WTWO (NBC/ABC, Channel 2), Terre Haute, Indiana.
WTIU (Educ., Channel 30), Bloomington, Indiana.
WDRB-TV (Ind., Channel 41), Louisville, Kentucky.

Carriage of these signals and the addition of WGN-TV would be fully consistent with Section 76.61 of the Rules.

2. Monroe asserts that its existing carriage and proposed carriage of WGN-TV are "grandfathered" under Section 76.65 of the Com-

[1] The city of Bloomington has a population of 43,188. The relevant township populations in Monroe County are: Benton, 1,976; Clear Creek, 2,474; Perry, 24,550 (portions of the city of Bloomington are in Perry Township and in Bloomington Township); Richland, 6,826; Van Buren, 6,709; and Bloomington Township, 37,228. All communities are served by one integrated system offering 12 channels, 8 for television signal carriage, one for non-automated and two for automated program originations.

mission's Rules because notice filed March 29, 1972, pursuant to former Section 74.1105, went unopposed. Indiana Broadcasting Corporation and Sarkes Tarzian, Inc., contend that Monroe was not authorized to provide WDRB–TV or WGN–TV prior to March 31, 1972. They point out that WDRB–TV and WGN–TV are signals distant to the Bloomington and Monroe County systems and that the systems' communities are within the predicted Grade A contour of a top-100 market station. Accordingly, petitioners assert that, to be grandfathered, Monroe should have filed a distant signal waiver request with the Commission, pursuant to former Section 74.1107 of the Rules, and should have received formal Commission approval of such request. Even though the Section 74.1105 notice was unopposed, the oppositions argue, mere notification of an intent to import such distant signals, with or without objections from interested parties, was insufficient for Monroe to obtain authorization and grandfather rights. In support, opponents cite footnote 58 of the *Cable Television Report and Order*, FCC 72–108, 36 FCC 2d 143, at 185, which states that authorized signals include those whose carriage has been permitted by specific decision of the Commission and those authorized by operation of the provision of former Section 74.1105 of the Rules and not inconsistent with former Section 74.1107.

3. Prior to March 31, 1972, the Rules required Monroe to file a distant signal waiver petition to seek authority to provide distant independent signals as part of its cable operations at Bloomington and Monroe County.[2] On August 9, 1966, Monroe did file a "Petition for Declaratory Ruling, for Waiver of Requirements of Section 74.1107(a) of the Commission's Rules and Other Appropriate Relief" to carry WGN–TV on its system at Bloomington (CATV 100–89). However, Monroe did not refer to either Monroe County or WDRB–TV in that petition. Since the new cable rules became effective before the petition was processed, it was dismissed as moot on November 2, 1972. Under the circumstances, WDRB–TV and WGN–TV cannot be considered as "authorized" signals in either Bloomington or Monroe County, and do not have grandfather rights, as provided by Section 76.65 of the Rules.[3]

4. When the issue of unauthorized carriage is raised, it is necessary for our consideration to reflect the particular facts of the situation. In *LaFourche Communications, Inc.*, FCC 73–122, 39 FCC 2d 472 (1973), and *Belle Glade Community Television Co., Inc.*, FCC 73–1211, 43 FCC 2d 988 (1973), we evaluated the initial improper cable service and its continued violation of our carriage requirements. Our paramount concerns in those cases, as here, were the public interest and subscriber service. In the case before us, the evidence does not indicate that Monroe intended to evade the requirements of former Section 74.1107, nor has such intentional violation of the Rules been alleged. Accordingly, although by no means condoning Monroe's conduct, we will not require that WDRB–TV, whose continued carriage is consistent with existing cable rules, be deleted.

[2] *Cable Television Report and Order*, Para. 13, *supra*; *Sammons Communications, Inc.*, FCC 73–363, 40 FCC 2d 461 (1973).
[3] *Cable Television Report and Order*, n. 58, *supra*.

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5. Indiana Broadcasting further argues that as a condition for grant, Monroe should state that it will comply with the syndicated program exclusivity rules. We decline to impose this condition because it is not contemplated by the Rules. However, we expect full compliance with the program exclusivity requirements of our Rules whenever Monroe provides these signals. *See Televents of San Joaquin Valley, Inc.*, FCC 73–1173, 43 FCC 2d 963 (1973); *Ceres Cable Co., Inc.*, FCC 73–188, 39 FCC 2d 686 (1973); *TelePrompTer of Greenwood, Inc.*, FCC 73–1339, —— FCC 2d —— (1973).

6. The oppositions also contend that a grant of Monroe's applications would threaten the economic viability of Stations WTTV, WRTV, and WISH–TV, respectively. Yet, no evidence is presented to sustain these contentions. Consistent with previous decisions, of which *Onondaga Video, Inc.*, FCC 73–1124, 43 FCC 2d 579 (1973), is among the most recent, we must deny the objections for lack of supportive detailed showings of adverse economic impact.

7. Because carriage of Stations WDRB–TV and WGN–TV is consistent with the Rules, and since these stations are not grandfathered, Monroe must provide public access and educational access channels consistent with our Rules.[5] In its application, Monroe proposes to specially designate a public access channel and to share educational access services with a cable channel that carries Station WTIU's educational programming. The oppositions assert that this access plan violates the requirements of Section 76.251 that a separate access channel be designated for each specified use. Monroe's "doubling up," it is contended, does not afford sufficient access capacity, as contemplated by the access provisions of the Rules. We considered a similar shared-channel access proposal that involved a *local* educational broadcast signal and educational access cablecasting in *Columbus Communications Corp.*, FCC 72–1188, 38 FCC 2d 875 (1972), where we rejected the plan.[6] There, we felt that access services would be stimulated if a specific channel were designated for a particular use, thus facilitating its availability through public identification with the services of designated channels. Though it is asserted that the local educational Station WTIU is on the air only 47.5 hours per week, as compared to the 126 broadcast hours per week of an average commercial station, we are not persuaded that the proposed procedure would insure availability of time and space for the educational access purpose. Accordingly, we will condition our grant herein on Monroe providing a specially designated educational access channel. In this connection, we note that Monroe has expressed its "willingness to make the required access channels available * * *" in a subsequent supplement to its application.

8. Section 76.251 of the Rules also requires that a cable system provide separate access channels and production facilities for each community served. Monroe requests a temporary waiver of this section

[5] Under Section 76.251(c), when two signals are added pursuant to Section 76.61 (b) or (c), two access cablecasting channels must be provided.

[6] But cf. *Metro Cable Co.*, FCC 73–89, 39 FCC 2d 169 (1973), where we accepted an access proposal that a *distant* educational station share space on an educational access channel.

insofar as separate access channels and facilities may be required for Monroe County. Because the submitted evidence shows that the city of Bloomington and the specified portions of Monroe County are served by a single integrated system and have a strong educational-political-economic community of interest, and that Monroe will provide designated channels for public and educational access services and production facilities located no more than two to seven miles from any of the communities served in the county, we conclude that a grant of the requested waiver until March 31, 1977, would be consistent with our access policies. *E.g.*, *TelePrompTer of Portsmouth, Inc.*, FCC 73–1207, 43 FCC 2d 1232; *Gerity Broadcasting Co.*, FCC 73–281, 40 FCC 2d 58.

In view of the foregoing, the Commission finds that a grant of the above-captioned application, as conditioned herein, would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Oppositions to Applications for Certification" filed by Indiana Broadcasting Corporation, Sarkes Tarzian, Inc., and McGraw-Hill Broadcasting Company, ARE GRANTED to the extent indicated above, and in all other respects ARE DENIED.

IT IS FURTHER ORDERED, That the applications (CAC–245, CAC–246) filed by Monroe All-Channel Cablevision, Inc., ARE GRANTED, subject to the condition expressed in paragraph 7 above, and appropriate certificates of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

104-029—74——8

FCC 74-222

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTIONS 73.35, 73.240 AND 73.636 OF THE COMMISSION'S RULES RELATING TO MULTIPLE OWNERSHIP OF STANDARD, FM AND TELEVISION BROADCAST STATIONS	Docket No. 18110

MEMORANDUM OPINION AND ORDER

(Adopted February 28, 1974; Released March 7, 1974)

BY THE COMMISSION: COMMISSIONER REID CONCURRING IN THE RESULT.

1. The Commission has before it the comments and replies filed in response to the Further Notice of Proposed Rule Making in this proceeding adopted March 25, 1970, 22 F.C.C. 2d 339.

2. The proposal in the Further Notice would require divestiture, within five years, to reduce one party's media holdings in any market to one or more daily newspapers, or one television broadcast station, or one AM–FM combination. Under the proposal, if a broadcast station licensee were to purchase one or more daily newspapers in the same market, it would be required to dispose of any broadcast stations that it owned in that market within one year or by the time of its next renewal date, whichever is longer. No grants for broadcast station licenses would be made to owners of one or more daily newspapers in the same market. Comments were also invited on whether divestiture should be required with regard to AM–FM combinations so that no party could own such a combination unless he had made a showing that the two stations were for economic or technical reasons so interdependent that one could not be sold without the other. There were two major concerns which led to the proposal. The first was the Commission's recognition of the need for diversity in sources of information on topics of public importance and the Commission's conclusion that it was necessary to explore whether adequate diversity is available. The second had to do with the question of economic concentration.

3. In response to the Further Notice, a large number of parties submitted comments including studies of the impact of newspaper-television cross-ownership on public access to divergent opinions on topics of public importance, the economic consequences of divestiture, and the effects of common ownership on competition and station performance. Although the proposal to require the separation of ownership of co-located daily newspapers and television stations received the most attention by the commenting parties, other points were also addressed.

4. The material submitted has been helpful in providing the Commission with a basis for arriving at decisions in this proceeding. How-

ever, there are certain areas concerning which it believes that additional information would facilitate the decision-making process. The Commission also believes it is in the public interest to develop such information by means of oral arguments and perhaps panel sessions as well as by affording interested parties an opportunity to file updating or elaborating materials. We do not mean to imply that material concerning areas not mentioned below would be unwelcome. Rather, we believe that in view of the record already established, the time and energies of interested parties and of the Commission could be more profitably spent by concentrating on the topics highlighted below.

5. In issuing the Further Notice of Proposed Rule Making in this proceeding, the Commission observed that the most significant aspect of the common ownership problem was that of co-located newspapers and television stations, both from the point of view of diversity of viewpoints and that of competition for advertising revenues. We are still of that opinion. Considering the controversy engendered by our proposal on that subject, as well as its core importance, we invite parties to focus primarily on the newspaper-television station cross-ownership proposal. Although not meaning in any way to limit comment thereon, specific aspects to which remarks might be addressed are the following: If divestiture is required, should it be required in all markets? Should it be limited to markets of a specified size, to those with a specified number of separate media voices, or to those with specific patterns of distribution of advertising revenues? Should it be otherwise tailored to respond to local variations which exist in different markets? Should the time required for divestiture be five years as proposed, or a longer or shorter period? How should the term "market" be defined for purposes of the rule? Should it be defined differently for newspapers than for television stations? Should the proposed rule apply to UHF television stations if it is adopted?

6. With regard to the foregoing, and the topics mentioned below, although no doubt in some cases it may be difficult to fashion comments so as not to be repetitious of what has already been submitted in this docket, we believe that to the extent that written and oral presentations do not duplicate the present record the work of the interested parties and of the Commission will be more efficient. This is so because what is now in the record will of course be given careful consideration in arriving at final decisions and it need not be repeated.

7. While urging divestiture as to newspaper-television combinations, the Department of Justice suggests that it is unnecessary to break up radio-newspaper or radio-television stations in larger markets. It states that such cross-ownership should only be examined in the smaller markets, e.g., markets below the top 100, and that this examination should take place on an *ad hoc* basis to determine whether divestiture is necessary in particular cases. It also suggests that the creation of new radio-newspaper or radio-television combinations be prohibited in all markets and that sale of existing combinations to a single party should be proscribed.

8. Another commenting party, agreeing that divestiture of radio-newspaper or radio-television combinations in larger markets is un-

necessary, but viewing an *ad hoc* approach as inefficient and ineffective for smaller markets, suggests that smaller markets be handled by a general rule instead. This party would define the smaller markets as those below the top 100 or top 200, or according to the number of radio stations in the market, and would take into account the types of radio stations in the market. The same party also suggests that as to radio-TV combinations, small markets might be defined as those with a single TV station.

9. Thus, although we have arrived at no conclusions in this area, we would welcome comments on such questions as whether to proceed on a case-by-case method or by rule in smaller markets and on how small markets should be defined, whether a rule should be adopted prohibiting the creation of new radio-newspaper or radio-television combinations in all markets, whether a rule should be adopted proscribing the sale of such combinations to the same party, etc.

10. As to AM–FM combinations, it may well be that rather than requiring separate ownership, an appropriate route to follow would be that of permitting such cross-ownership but of amending our present AM–FM non-duplication rules, which prohibit more than 50% duplicated programming in communities of more than 100,000 population, by making them more restrictive. To this end, we shall in the near future issue a Notice of Proposed Rule Making intended to explore various possibilities for amendments of the rule.

11. Although we have previously expressed the intention of considering the problems of cross-ownership of co-located newspapers and cable television systems (Docket No. 18891) and cross-ownership of co-located newspapers and broadcast stations (Docket No. 18110) at the same time, we have on further consideration decided against this. There are, of course, similarities in the problems relating to the two types of cross-ownership, but there appear to be fundamental differences that suggest separate treatment might be advisable. For this reason, we do not now invite parties to submit written comments on the subject of newspaper-cable cross-ownership or to make oral presentations on that subject. Such submissions or presentations may be requested at a later date.

12. As previously stated, both for up-dating and elaboration we would welcome supplemental written filings. Moreover, we would do so both from original or other parties. To permit these filings to be studied before oral argument takes place, we shall specify a deadline of May 1, 1974, for them. Oral argument will be held on June 18, 19 and, if necessary, June 20, 1974. This provides about 60 days for the submission of written material and allows us a short time in which to examine it before the oral argument. No one must file, but for those that do so, the usual requirement of an original and 14 copies shall apply.

13. May 1, 1974, is also the deadline for requesting an opportunity to participate in oral argument. For this purpose, parties should file separately from their comments an original and two copies of their request, referring to this docket and directing it to the attention of the Dockets Branch, Office of the Secretary. When filing, parties should

indicate who is to appear on their behalf and how much time is requested. Thereafter, the Commission will notify the parties of the schedule for oral argument. To the extent possible, parties will be given the amount of time requested. Since sufficient time may not be available, the Commission encourages parties wishing to present like views to join in a single presentation. As to panel sessions, the Commission will subsequently decide whether they will be held and, if so, on the precise format, timing and participants.

14. Accordingly, IT IS ORDERED, That oral argument IS SCHEDULED in this proceeding as outlined in the above discussion.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-210

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of
NORTHERN TELEVISION, INC. (KFRB), FAIRBANKS, ALASKA
Has: 900 kHz, 10 kW, U
Requests: 820 KHz, 10 kW, U
For Construction Permit

MEMORANDUM OPINION AND ORDER

(Adopted February 27, 1974; Released March 7, 1974)

BY THE COMMISSION:

1. The Commission has before it the above-captioned application and a request for waiver of section 73.182(t) of the rules.

2. Section 73.182(t) requires that 10% skywave field intensity values of a station on a class I–A or I–B clear channel, such as 820 kHz, be computed utilizing Figure 1a, section 73.190. The applicant did not use Figure 1a but instead used new 10% skywave curves which were extrapolated from Figure 2 of section 73.190.

3. The subject application was originally filed March 8, 1973, along with a request for waiver of section 73.25(a)(4) since the proposed .025 mV/m-10% skywave contour would penetrate the border of the 48 contiguous United States. On April 11, 1973, we denied the request for waiver and returned the subject application for the reasons set forth at that time. *Northern Television, Inc.*, 40 FCC 2d 993, 27 RR 2d 301 (1973). On September 24, 1973, the application was resubmitted indicating compliance with section 73.25(a)(4) but requesting a waiver of section 73.182(t).

4. In support of the request for waiver, the applicant claims that Figure 1a, section 73.190, is not and never was an accurate basis for predicting skywave interference between Alaska and the continental United States and that Figure 2, section 73.190, is more applicable to these transmission paths. It is indicated that based on appropriate curves extrapolated from Figure 2, the proposed operation would be in compliance with section 73.25(a)(4). It is further claimed that in Alaska, satisfactory reception is possible at a signal level much lower than those recognized as suitable in the continental United States and that these signals are useful both day and night. It is stated that due to the massive land areas of Alaska, those low signal levels are of great value to outlying areas.

5. Section 73.182(t) has long been used as part of a technical basis for assignment of nighttime standard broadcast stations. Figure 1a, section 73.190, entitled, "Skywave Signals for 10% and 50% of the

Time" is specified by section 73.182(t) as the engineering curves to be utilized in the allocation of nighttime stations to class I–A and I–B clear channels. The utilization of these curves has proven technically sound in the assignment of this type of facility in both the continental United States and Alaska. In fact, when Northern Television, Inc., originally filed the subject application, Figure 1a was used in the nighttime allocation study by the applicant. KFRB now claims that a more accurate showing of the proposed .025 mV/m-10% skywave contour can be obtained by making use of Figure 2, section 73.190, entitled, "10% Skywave Single Range." This figure is a family of curves which incorporates the effect of mid-point latitude on electromagnetic propagation in the standard broadcast band. Figure 2 is designated by section 73.182(t) to be utilized in the technical assignment of nighttime stations to other than class I channels [specifically, Figure 2 is used in nighttime allocation studies on regional (class III) frequencies]. Since the range of the curves on Figure 2 does not extend to a mid-point latitude north of 50°, the applicant has extrapolated three new curves from Figure 2 for the pertinent mid-point latitudes of 56°, 58° and 60°. (The mid-point latitude involved in this specific case is 57°.) The method used for development of these new curves was based on data from a report entitled, "Skywave Recording—Skywave Propagation Curves from 50° Latitude" (Reference—RSt. R.3) from the Canadian Department of Transport, as well as engineering judgment and approximations. Based on these extrapolated curves, the applicant indicates that the proposed operation would deliver a 10% skywave signal of less than .025 mV/m at all points on the border of the 48 contiguous states and, therefore, is in compliance with section 73.25(a)(4).

6. First, we find that the applicant's method of extrapolation by which the new curves on Figure 2 were determined cannot be considered acceptable. In this regard, we note that the curves of Figure 2 extend to a path mid-point latitude of 50° and their extrapolation to higher geographic latitudes is open to question if reasonably accurate results are required. The ionospheric parameters of importance in the attenuation by absorption of nocturnal, medium-frequency skywave fields are more nearly related to geomagnetic coordinates than to geographic coordinates. Any extrapolation of measurements or data based upon measurements from one path mid-point to another must be based upon the difference in the geomagnetic dip rather than the difference in geographic latitude alone. The length of the great circle path between Fairbanks and the U.S./Canadian border near Vancouver is approximately 2000 km (1,243 miles) and the geographic coordinates of the path mid-point are 57° north latitude and 134° west longitude. The magnetic dip at this point is approximately 75°. Most of the measurements in support of the curves of Figure 2 involve path mid-point geographical longitudes of between 100° and 110° west. Because of the location of the north magnetic pole, a dip of 75° in these longitudes occurs at geographic latitudes of 48° and 50°, north instead of at 57°, north. Therefore, the curves of Figure 2 for latitudes of 48° to 50° would be more applicable to the KFRB-to-Vancouver path mid-point than would the extrapolation to 57° as suggested by the appli-

cant. The use of the 50° curve at a distance of 1,243 miles indicates that compliance with 73.25(d)(4) of the rules will not be achieved by the proposed operation. To evaluate our interpretation of the proper extrapolation of the curves of Figure 2 to the KFRB problem we applied the prediction technique for medium-frequency nocturnal skywave field strength as set forth in CCIR Report No. 264–2, New Delhi, 1970. This report is based upon the analyses of more than 67,000 hours of low and medium frequency skywave recordings by the European Broadcasting Union and the International Broadcasting Television Organization. These recordings were correlated with the magnetic dip rather than the geographic coordinates. Based on our calculation, the 10% skywave field strength at the border was computed to be in the range from .038 mV/m to .053 mV/m for the proposed KFRB operation which, as mentioned above, is in excess of the .025 mV/m permitted by section 73.25(a)(4). We would note that due to a number of variables involved, in particular, magnetic dip, a range of field strength values were obtained rather than a single fixed value which further adds to the complexity and uncertainty of this situation. We also would note that application of Figure 2 to clear channels would add considerable engineering complexities to nighttime engineering studies on those frequencies. For example, the determination of the extent of a 0.5 mV/m-50% skywave contour of a class I station with a directional antenna system would become an extremely difficult matter. In fact, such a determination could only be made by using either an extremely tedious trial and error method, "three-dimensional" graph paper, or sophisticated computer programs. Finally, we would point out that we believe a change in our technical standards of allocation, such as is proposed by KFRB should more appropriately have been submitted in the form of a petition for rule making rather than on an *ad hoc* basis.

7. As we previously pointed out, *Northern Television, Inc., supra*, since KFRB is a class II facility it is only protected to the groundwave coverage contours specified in our rules and international agreements. Any discussion of areas and/or populations beyond the extent of these contours is simply without merit since these areas are subject to interference at any time from new domestic or foreign allocations. The present and proposed *normally protected* service contours of KFRB on 900 kHz and 820 kHz, respectively, are the same, 0.5 mV/m during daytime hours and 2.5 mV/m during nighttime hours.

8. We have fully considered the comments submitted in support of the request for waiver of section 73.182(t), but we find that the circumstances presented are not sufficient to warrant favorable consideration of the request for waiver. Since the applicant has failed to set forth sufficient reasons, if true, to justify waiver, there is no need to conduct a hearing and the application will be returned. *United States v. Storer Broadcasting Co.*, 351 U.S. 192, (1956).

9. Accordingly, IT IS ORDERED, That, the request of Northern Television, Inc., for a waiver of section 73.182(t) IS DENIED and the application IS HEREBY RETURNED as unacceptable for filing.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-202

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of PALMETTO CABLEVISION INC., LEXINGTON COUNTY, S.C. COLUMBIA CABLE TV CO., INC., LEXINGTON COUNTY, S.C. For Certificates of Compliance and Petitions for Special Relief	CAC-1268 SC040 CAC-2480 SC052

MEMORANDUM OPINION AND ORDER

(Adopted February 27, 1974; Released March 7, 1974)

BY THE COMMISSION:

1. The Commission has under consideration applications for certificates of compliance to serve the unincorporated areas of Lexington County, South Carolina, filed by Palmetto Cablevision, Inc. and Columbia Cable TV Co., Inc. Lexington County is located within the Columbia, South Carolina television market (#100). Both systems have proposed to carry the following television broadcast signals.

WIS-TV (NBC, Channel 10), Columbia, South Carolina.
WNOK-TV (CBS, Channel 19), Columbia, South Carolina.
WOLO-TV (ABC, Channel 25), Columbia, South Carolina.
WRLK-TV (Educ., Channel 35), Columbia, South Carolina.
WTCG (Ind., Channel 17), Atlanta, Georgia.
WEBA-TV (Educ., Channel 14), Allendale, South Carolina.

In addition, Palmetto proposes to carry WRET (Ind., Channel 36), Charlotte, North Carolina, and Columbia proposes to carry WRIP-TV (Ind., Channel 61), Chattanooga, Tennessee. Carriage of these signals is consistent with Section 76.63 of the Rules, and there is no objection to the signal carriage.[1]

2. Palmetto and Columbia have opposed each other's applications for certification, Columbia, arguing that there has been no decision whether South Carolina counties may grant franchises and that, therefore, certification would be premature, and Palmetto maintaining that Columbia's application is a "thinly veiled" attempt to protect itself from legitimate competition by demanding consolidated processing with Palmetto's application in order to delay its processing. In addition, Palmetto's application has been opposed by Palmetto Radio Corporation, licensee of Television Station WNOK-TV, Columbia, South

[1] The population of Lexington County is approximately 120,326. Palmetto will provide a system with a 26-channel capacity. Columbia Cable will provide a system with a 30-channel capacity. Both Palmetto and Columbia have assured us of their intention to comply with the access provisions of Section 76.251 of our Rules.

Carolina. Palmetto Radio Corporation notes that Palmetto has failed to specify the particular community it proposes to serve within the unincorporated areas of Lexington County. Finally, both Palmetto and Columbia submit with their applications a petition for special relief pursuant to Paragraph 116 of the *Reconsideration of the Cable Television Report and Order*, 36 FCC 2d 326, where the Commission determined that where there is no "franchise or other appropriate authorization available for a cable operator to submit in his application for certificate of compliance, the Commission will deal with the situation on a case-by-case basis through the special relief provisions of Section 76.7 of the Rules".

3. The Commission takes note of the South Carolina Supreme Court decision in *Richland County State of South Carolina* v. *Palmetto Cablevision, Inc.*, 199 S.E. 2d 168 (September 7, 1973), where the court held that counties in that state do not have franchising powers. The result of this opinion and our decision to consolidate both applications for simultaneous action, at this time, renders moot the objection of both Palmetto and Columbia to one another's applications. There being no necessity to consider further the matter of franchising jurisdiction, we may proceed to the merits of the applicants' requests for special relief.

4. In the absence of franchises, both applicants have proposed to operate their systems in compliance with the provisions of Section 76.31 of our Rules: significant construction will begin within one year after certification; a local business office will be maintained; there will be an agent to receive, investigate and resolve subscriber complaints; subscriber fees will be equitable; subsequent modifications of the Commission's Rules will be observed. In addition, Columbia notes that it will publish initial installation and subscription fees in a newspaper of general circulation, maintain its rates according to industry standards, and not increase rates without notice to its subscribers. We find these assurances to be an acceptable alternative proposal to assure compliance with the policies of Section 76.31 of our Rules. *See Television Communications Corporation*, 41 FCC 2d 945. Consistent with our practice in similar cases, we shall certify both proposed systems until March 31, 1977.[2] These grants are made subject to any further orders of the Commission designed to resolve general problems inherent in non-franchised cable operations, or to address any special problems that may be brought to the Commission's attention involving cable operations in the subject communities.

5. We agree, however, with the contention by Palmetto Radio Corporation that Palmetto has failed to specify which specific areas it will serve within the unincorporated area of Lexington County, and we note, *sua sponte*, that Columbia's application is similarly deficient. This is a matter which must be resolved. Although, in the instant case, it does not appear that the proposed signal carriage would be affected, it is apparent that a system serving one area in a county might be required or permitted to carry signals not required or permitted in another area in the same county. Further, it has been

[2] E.g., *Mahoning Valley Cablevision, Inc.*, FCC 73-347, 39 FCC 2d 939.

our determination that all parts of a franchise area be equitably served.[3] We must take the pragmatic view that few systems propose to serve all parts of an entire county, and most systems, therefore, will serve only specific areas. The decision as to which areas in a county will in fact be served is the responsibility of the franchising authority, but the Commission must be informed. Accordingly, while we grant the captioned applications, we shall withhold issuance of the certificates pending notification of the specific areas proposed to be served in Lexington County.

In view of the foregoing, the Commission finds that a partial waiver of Section 76.31 of the Rules and a grant of the captioned applications would be in the public interest.

Accordingly, IT IS ORDERED, That the "Objection of Palmetto Radio Corporation pursuant to Section 76.27" filed by Palmetto Radio Corporation, Inc., November 24, 1972, IS GRANTED, to the extent reflected herein, and is otherwise DENIED.

IT IS FURTHER ORDERED, That "Opposition to Application for Certificate of Compliance for Lexington County, South Carolina," filed by Columbia Cable TV Company, Inc., November 22, 1972, IS DISMISSED.

IT IS FURTHER ORDERED, That the "Opposition to Application for Certification and Request for Special Relief" filed by Palmetto Cablevision, June 18, 1973, IS DISMISSED.

IT IS FURTHER ORDERED, That the "Application for Certificate of Compliance and Petition for Special Relief" (CAC–1268), filed September 22, 1972, by Palmetto Cablevision, Inc. for Lexington County, South Carolina, IS GRANTED and an appropriate certificate of compliance will be issued.

IT IS FURTHER ORDERED, That the "Application for Certification and Request for Special Relief" (CAC–2480), filed by Columbia Cable TV Co., Inc. May 7, 1973, IS GRANTED and an appropriate certificate of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

[3] Para. 180, *Cable Television Report and Order*, 36 FCC 2d 143.

FCC 74–221

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of CONSIDERATION OF THE OPERATION OF, AND POSSIBLE CHANGES IN, THE "PRIME TIME ACCESS RULE", § 73.658(k) OF THE COMMISSION'S RULES	Docket No: 19622; RM–1967, RM–1935, RM–1940, RM–1929

MEMORANDUM OPINION AND ORDER DENYING STAY

(Adopted February 27, 1974; Released March 6, 1974)

BY THE COMMISSION: COMMISSIONERS ROBERT E. LEE, REID, WILEY, AND HOOKS CONCURRING IN THE RESULT.

1. The Commission here considers a "Petition for Stay" filed on February 11, 1974, by the National Association of Independent Television Producers and Distributors (NAITPD), directed at our decision in this proceeding adopting modifications of the prime time access rule (§ 73.658(k) of our Rules) to be effective in September 1974.[1] NAITPD, which has sought judicial review of our decision in the U.S. Court of Appeals (C.A.2), asks that the effective date of the changes be September 1975, a stay of one year, *inter alia* because of the uncertainty which will prevail pending disposition of its appeal. This would leave the present rule in effect until that time. By Public Notice of February 14, 1974 (FCC 74–173) the Commission gave notice of the filing of this petition, and, pursuant to § 1.45 of the Rules, stated that oppositions and other material relating to the petition might be filed until February 21, 1974.

2. The NAITPD petition drew six formal supporting statements, from the Association of Independent Television Stations, Inc. (INTV), Westinghouse Broadcasting Company, Inc. (Westinghouse), Viacom International, Inc. (Viacom), Time-Life Films, Sandy Frank Program Sales, Inc. (Frank), and Rust Craft Broadcasting of New York, Inc. (WROC–TV, Rochester, N.Y.). NAITPD also filed "Supplementary Information" in support of its petition. There were also supporting letters or telegrams from Filmways, Inc. (producer of the syndicated *Ozzie's Girls* program), Don Fedderson Productions, Inc.

[1] FCC 74–80, released February 6, 1974, published at 39 F.R. 5585 (February 14, 1974). The effective date of the changes was specified as whatever date in September 1974 the station's network designates as the start of its new season.

The decision made several changes in the rule; those of particular significance to NAITPD appear to be the removal of all restrictions on Sunday and on the first half-hour of prime time on other days (7–7:30 E.T. and P.T., 6–6:30 C.T. and M.T.), and the provision that one of the six "cleared" half-hours (Monday–Saturday 7:30–8 E.T.) may be filled with network or off-network material which is children's specials, documentary or public-affairs material. Reference is also made to one part of the decision not set forth in the rule, which states the Commission's expectation that an appropriate portion of the cleared periods, or at least of total prime time, will be devoted to locally significant material of certain types.

(distributor of the *Lawrence Welk* program), Lawrence Welk, Yongestreet Program Services, Inc. (producer of the *Hee Haw* show), Metromedia Producers Corporation (particularly concerning a new one-hour program it is marketing for this coming year), Jim Victory Television, Inc. (distributor of the *Concentration* program) and two program processing companies (Glen Glenn Sound and Consolidated Film Industries). Four formal oppositions were filed, by Columbia Broadcasting System, Inc. (CBS) and three major film producers—MCA, Inc., Warner Brothers, Inc., and Screen Gems Division of Columbia Pictures, Inc. Opposing telegrams were also received from Chester L. Midgen, Executive Secretary of the Screen Actors Guild, and from some 13 program producers, most of them members of the National Committee of Independent Television Producers, a group opposed to the prime time access rule which has urged its repeal.[2] These include Lee Rich (Lorimar Productions) and Gene Roddenberry (chairman and co-chairman of the group), Bud Yorkin (Tandem Productions, Inc.), Jack Webb (Mark VII Ltd.), Duke Vincent (Vincent Productions), Quinn Martin (QM Productions), Jack P. Foreman (Samuel Goldwyn Studio), Jackie Cooper (Jackie Cooper Productions), Bruce Johnson (Bruce Johnson Productions), Grant A. Tinker (MTM Enterprises, Inc.), Bill Persky and Sam Denoff (Concept II), George Schlatter (George Schlatter Productions), and Bob Banner. American Broadcasting Companies, Inc. (ABC) filed a statement stating that it does not oppose the stay; National Broadcasting Company, Inc. (NBC) did not file any material on this subject.

3. Upon consideration of the foregoing we are of the view that this Petition for Stay filed by NAITPD should be denied. In the material presented to the Commission on this question, there is nothing that convinces us that our previous determination as to the date of effectiveness of the modifications adopted in this proceeding should be abandoned. The matter of the appropriate effective date of the changes—designed to give enough "lead time" for an orderly transition and yet implement reasonably early the changes found to be in the public interest—was considered and discussed at length in the Report and Order herein (FCC 74–80, pars. 113–116), in connection with a similar petition filed by NAITPD; and we find in the material before us now no reason to change this decision.

4. One of the threshold criteria for granting a stay in connection with an appeal is a showing that petitioner is likely to prevail on the merits. NAITP's argument concerning this matter is brief and general. We find that its showing in this basic respect is clearly insufficient, and therefore grant of a stay would be inappropriate. It is unnecessary to discuss at length the other matters urged. As to the irreparable injury claimed, to independent program producers and syndicators, this appears speculative in view of: (1) the substantial amount of "cleared" time remaining under the revised rule (the reduction is in

[2] The text of all but two of these telegrams from NCITP producers was identical.

fact less than that asserted by NAIPTD)[3]; (2) the established position of some of the programs particularly mentioned (such as *Hee Haw* and *Lawrence Welk*) so that reduction in "cleared" time need not necessarily mean non-clearance by stations; (3) the uncertainty as to whether the networks (particularly ABC and CBS) will use additional time the first year other than on Sundays; and (4) the opportunities for clearance at other times (e.g., *Hee Haw* in Washington, D.C., carried in the "network" portion of prime time) or (in the larger markets) on independent stations not covered by the rule (each of the two programs mentioned is carried on independent stations in the top three and two or three more of the top 10 markets).

5. Moreover, much of the impact claimed to result from a contraction in the amount of "cleared" access time is something which will happen at whatever time the new rule goes into effect, and thus is not reason to make it 1975 instead of 1974. It is also to be noted that these and other parties have long been on notice, since the fall of 1972, that the Commission was considering changes in the rule, or repeal of it, going considerably beyond the reduction in cleared time finally adopted. In sum, as mentioned in our decision, the rule in its present form operates as a restraint which is not fully justified, and it is appropriate to act at a reasonably early date to lessen the restraint, in the public interest.

6. Accordingly, IT IS ORDERED, That the Petition for Stay filed by the National Association of Independent Television Producers and Distributors (NAITPD) on February 11, 1974, requesting a one-year stay in effectiveness of the modifications of the prime time access rule (§ 73.658(k) of the Commission's Rules) adopted in this proceeding, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

[3] NAITPD *et al* claim that the reduction is from 42 to 12 half-hours a week. As pointed out at some length in our decision, with respect to 90% of the stations covered by the rule, 15 half-hours per week per market (Monday–Friday 7–7:30 p.m. E.T. etc.) are used for programming which existed before the rule in this time period (local or network news and stripped game shows) and thus does not appear to need the rule's economic support. This reduces the "base" to 27. The figure of 12 half-hours under the new rule assumes the maximum possible reductions for regular network programs on Sundays, "special" network programs on one other night, and a half-hour of "cleared" time (rather than other prime time) for "locally significant" material. A figure of 14–16 remaining "cleared" periods per market appears more nearly realistic.

FCC 74-215

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of PETITION FOR RULEMAKING TO REQUIRE BROADCAST LICENSEES TO MAINTAIN CERTAIN PROGRAM RECORDS	Docket No. 19667 RM-1475

MEMORANDUM OPINION AND ORDER AND SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

(Adopted February 27, 1974; Released March 4, 1974)

BY THE COMMISSION: COMMISSIONER REID CONCURRING IN THE RESULT.

1. The Commission has before it petitions for reconsideration of its First Report and Order in this proceeding (39 Fed. Reg. 1763, published January 14, 1974), filed by Capitol Broadcasting Company, Inc. ("Capitol") and by the National Broadcasting Company, Inc. ("NBC"). The National Citizens Committee for Broadcasting ("NCCB") has filed an opposition to Capitol's petition. NBC has also filed a petition seeking partial stay of the newly adopted rules.

2. The two petitions for reconsideration raise notably different questions regarding the rules we adopted to permit the public inspection of television station program logs. In essence, the new rules allow such inspection unless good cause for refusing to do so exists and sets up certain procedural requirements such as the need for a prior appointment, assumption of cost by the inspecting party and various others. It also specifies what to do when a written log is not prepared. Capitol seeks modification of the newly adopted procedures for public inspection of television station program logs to require that more information be provided by those requesting access to the logs. NBC's petition deals only with the use of an automatic tape logging process which does not provide a written log.[1] As indicated in the First Report and Order, it was our desire to explore the subject of automatic logging in its relation to public access, and this document is intended to provide formal Notice of our intent to consider rules in this area. This document also serves to respond to the petitions for reconsideration. Finally, it responds to questions that have been raised about what logs are to be available when the rule becomes effective on March 1, 1974. We shall respond to these questions before turning to the other matters before us.

3. As adopted, the rule becomes effective on March 1, 1974. Several parties have wondered whether all of the logs 45 days old or older to which the rule applies would become available at that time or whether the rule applied only to the logs for some lesser period. The

[1] The rules require that logs be kept but allow use of automatic equipment even if the log exists in tape form rather than in written form.

answer is simple: the logs inspectable on March 1, 1974, are those for the entire two-year retention period, except for those less than 45 days old. In other words, the logs from March 1, 1972, to January 15, 1974, would be those to which the rule applies when the rule first becomes effective. By way of clarification, it might also be mentioned that any change in ownership would not affect the situation, so the assignee or transferee would assume responsibility for the entire two-year retention period of logs even though it has not held the station for that entire period.

4. Capitol filed a brief petition seeking changes only in certain of the procedural aspects of inspection. In its view, those changes would bring benefits by more closely identifying the inspecting party, by better protecting the original logs, and by more clearly indicating the representative capacity of the inspecting party. NCCB objected at length, arguing that these requirements could vitiate the purposes of the rule and possibly lead to intimidation of the party wishing to inspect. While we do not accept the basis for all of NCCB's objections, we have not been persuaded by Capitol's petition that these changes would serve any useful purpose.

5. Capitol seeks a written request to inspect the logs. If the required information were supplied in full orally, such a requirement would not appear to offer any real benefit, unless the Commission were prepared to follow Capitol's urging and require the much more extensive showing it seeks and even more importantly to specify a mandatory one-week notice period. If a one-week period were used, there could very well be a need for written proof of service, but the need for a mandatory one-week delay has not been established. The point of adopting a provision requiring an appointment was to accommodate the needs of the public without undue disruption to the broadcaster. The idea was that the inspection could take place at a mutually convenient time and place and the station could have time to assemble the logs for inspection. There is no reason to conclude that a minimum of a week is required under ordinary circumstances for this purpose, and as NCCB points out, access to the regular station public file requires no advance appointment at all. Since the prior appointment procedure appears to provide adequate protection against undue disruption, the need for one-week delay has not been established. Accordingly, we shall not make the requested change in the rule.

6. Capitol urges us to require that the inspecting party indicate with particularity the logs its wishes to inspect. While knowing in advance might be of assistance to the station in preparing for the inspection, NCCB contends that it may not always be possible to provide such information. NCCB's point is that a sampling of logs is what is desired, with apparently such further examination as would then seem appropriate. If the logs had to be specified in advance, this latter step would not be possible. Our problem with this requirement has to do with this limiting effect. If a list were provided, the likely result would be that the party would be limited to the logs specified. Since the original list could not be based on knowledge of what the logs contain, such a restriction on further inquiry would not be in keeping with the purpose of the rule. Moreover, it in any event could be defeated by

a request to see all of the logs for the two-year period. Even though we shall not follow Capitol's request by adopting this change, we do urge parties desiring to inspect to cooperate in the process by listing the logs desired if that is at all possible.

7. Finally, Capitol desires much more identification than name, address, organization and general purpose of the examination as the rule now requires. Capitol wants a list of the organization's officers and directors, its purpose and the general composition of its membership. Also, if the inspecting party is not an officer of the organization, Capitol wants a requirement that a written authorization from the organization must be provided. On the other hand, NCCB fears that such requirements could lead to intimidation and to an effort to discourage members of the public from exercising their right to examine the logs. In support of this view, it cites the Commission's approach to identification requirements for those wishing to look at the station's public file and its rejection of expanding such identification requirements.

8. The approach followed in the log inspection rule regarding identification represented a compromise. It called for providing more information than in the case of examining the public file, but it avoided requirements that could lend themselves to abuse. Thus, if a licensee were to have a basis for deciding whether there is good cause for refusing an inspection request, it needed to know more than just the name and address of the party. The organization represented and the purpose of inspection were also relevant to the exercise of licensee judgment about good cause, as in refusing the request of a competitor, for example. On the other hand, knowledge of the officers, membership and purpose of an organization is not necessary to enable a licensee to exercise its judgment, but a requirement that this information be provided has a real potential for intimidation, whether intended or not. Under such circumstances, establishing such a requirement could only work at cross-purposes with the intent of the rule. As to requiring a written authorization for non-officers of an organization, any such requirement would serve no purpose, as an individual does not need to be a member of an organization in order to have access to the logs. In information gathering, as distinguished from negotiations with local groups as takes place from time to time, the representative capacity of the person is not a vital matter. Nor could an organization's not having given its authorization work to deprive the person of his rights simply as a member of the public. Therefore, we deny these proposed changes as well.

9. NBC, in its two pleadings, is concerned with only one provision of the new rules. That is the requirement in the Note to Section 73.674(c) that stations not having a written log shall update and certify their pre-logs (operating schedules). As the only licensee known to be using an automatic tape recording system for logging, NBC expresses concern that the requirement will vitiate the benefits its automatic logging system is intended to provide. It states that if it had to go to the effort of updating and certifying, it would have no reason to continue using its automatic logging. Such a result it sees as being contrary to the portions of the Commission's rules authorizing automatic logging. This leads NBC to ask a stay of the March 1 date

until the Commission shall have explored the question of automatic logging as it said it would in its Report and Order. NBC also asks to be relieved from what it sees as a burdensome requirement of updating and certification. Instead, it would make its pre-logs available, and upon a showing of good cause, it would up-date them.

10. As indicated before, we wish to explore automatic logging, and comments on this point are requested. As to NBC's petitions, the question is, what shall be done in the interim? The fact that automatic logging is permitted, does not in itself answer all questions which are involved. Otherwise, the inevitable result would be that the choice of equipment would be the sole determinant of public access. Or, if in response NBC's urgings are followed, the industry would have two categories of parties, NBC and everyone else. Virtually all other stations are keeping logs in the traditional written form,[2] and the work involved is essentially that required of NBC. The only effort for NBC would result from a decision to pursue both methods at once. NBC is not obliged to stop its automatic logging. At most, the stay could only affect the interim period before action is taken as a result of the Further Notice. Since we expect to reach our conclusions promptly, there will be no long-term impact on NBC. At the most, it may have to temporarily utilize the same procedures as do most other stations. This involves no extra cost as such (unless it does both at once) and the only real effect is to delay such savings as are provided by automatic logging. We cannot find that the burden thus imposed on NBC would be so great as to require us to create a special exception and to devise special rules to govern good cause showings. Needless to say, NBC's views will be considered in arriving at our conclusions regarding the subject of the Further Notice. In the meantime, since the impact on NBC has not been shown to be of such magnitude as to require the special relief which has been sought, its petitions will be denied.[3]

11. We invite comments on all pertinent aspects of television automatic logging. In addition to the views of licensees and of individuals desiring to inspect logs, we seek information from equipment manufacturers and others who can offer guidance on the technologies involved. Should we adopt special rules when automatic logging is used? If so, should there be different rules depending on the type of system which is employed? How can we best provide for technological improvement consistent with the goals of the inspection rule and the

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[2] Equipment also exists which provides a printed-out log with the same information as the hand written log. Obviously, parties using this equipment need no special relief as such logs serve the same purpose as traditional logs.

[3] It is not our intention, however, to impose any unnecessary burden on NBC. Accordingly, for those two NBC stations already using automated logging we see no need for immediate updating of the operating schedules for the period prior to March 1, 1974 on the mere assumption that inspection might take place and that examination of the pre-logs and/or the taped logs will not satisfy the person making the inspection. We see no problem with the stations' waiting until a request is made before updating those particular pre-logs, even if this produces some minor delay in which the inspection takes place. NBC would be given an opportunity to demonstrate that good cause existed for not honoring such a request on the grounds that the pre-logs and the taped logs were sufficient for the purposes for which inspection was sought and the expense that would be incurred in going back to update the pre-logs would be excessive under the circumstances. For the period beginning March 1, 1974 the operating schedules of all NBC stations, including those two now using taped automatic logging, will need to be certified and made available for public inspection upon request in the same manner as those of all other stations.

dialogue it is intended to foster? In advance of the comments received, we shall not specify any particular rule provisions, but commenting parties should use the present rule as a starting point and offer guidance on whether to change it and if so, how.

12. Accordingly, pursuant to authority contained in Sections 4(i), 303(g), (j) and (r) of the Communications Act of 1934, as amended, the amendment of the Commission's rules as described above IS PROPOSED.

13. Pursuant to applicable procedures set forth in Section 1.415 of the Commission's Rules, interested persons may file comments on or before April 12, 1974, and reply comments on or before April 22, 1974. All relevant and timely comments and reply comments will be considered by the Commission before final action is taken. In reaching its decision in this proceeding, the Commission may also take into account other relevant information before it, in addition to the specific comments invited by this Notice.

14. In accordance with the provisions of Section 1.419 of the Rules, an original and 14 copies of all comments, replies, pleadings, briefs, and other documents shall be furnished the Commission. These will be available for public inspection during regular business hours in the Commission's Public Reference Room at its Headquarters, 1919 M Street, N.W., Washington, D.C.

15. IT IS ORDERED, That the Petition for Reconsideration filed by Capitol Broadcasting Company, Inc., IS DENIED.

16. IT IS FURTHER ORDERED, That the Petition for Reconsideration and the Petition for Partial Stay of Effective Date As to Stations With Automatic Logging Facilities, filed by the National Broadcasting Company, ARE GRANTED TO THE EXTENT INDICATED AND IN ALL OTHER RESPECTS ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

45 F.C.C. 2d

104-029—74——9

FCC 74-195

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of INQUIRY INTO PROBLEMS OF PUBLIC COAST RADIOTELEGRAPH STATIONS	Docket No. 19544

SECOND NOTICE OF INQUIRY

(Adopted February 27, 1974; Released March 8, 1974)

BY THE COMMISSION:

1. The proceeding in Docket No. 19544 was initiated pursuant to Section 403 of the Communications Act of 1934 by the Commission's Notice of Inquiry (37 FR 15197, 36 FCC 2d 620) released July 20, 1972. The purpose of this proceeding is to conduct an overall review of the operations of public coast radio stations providing common carrier radiotelegraph services with the view towards the establishment of a policy framework in which to resolve the matters described in the Notice of Inquiry which are presently pending before the Commission.

2. As requested in Appendix A to the Notice of Inquiry, the major carriers presently operating public coast radiotelegraph stations (ITT World Communications Inc., RCA Global Communications, Inc., and TRT Telecommunications Corporation) have submitted a substantial amount of useful detailed information concerning the operations of their existing coast stations. Comments and reply comments have also been filed by other interested parties. In addition, a study contract was entered into by the Commission with Advanced Technology Systems, Inc. (ATS) so that we could have the benefit of an independent analysis of the problems facing the industry, as contrasted to the comments filed in response to the Notice of Inquiry. The final report resulting from this study, which was completed and submitted to the Commission in December 1973, is attached as the Appendix to this document.

3. The findings and recommendations in the ATS study are extensive as well as being novel in some respects to the present operations of public coast radiotelegraph stations. While we have not completed our review of the contents of this report, we do believe that its usefulness will be enhanced with the filing of comments by other parties interested in this proceeding. In particular, the three alternative coast station configurations listed in the ATS report are not the only ones that will be examined in the course of this proceeding. The examination of any potentially feasible alternative and decisions relating to the final arrangement of public coast radiotelegraph stations will be based primarily on the quality and scope of the maritime services to be rendered by the particular configuration and will not be limited solely to cost-revenue considerations. With respect to the landline system

described by ATS to interconnect coast stations, there are a number of policy and practical questions relating to assuring the nondiscriminatory distribution of traffic between stations and to the equitable distribution between users of the costs of such a system which have to be resolved before the Commission can decide if such a system should be implemented.

4. The pending applications of the major carriers for authority to discontinue the services presently provided at certain of their public coast stations constitute one of the most pressing matters with which this proceeding is concerned. These carriers take the position that the closure of these stations will improve the financial viability of the remaining stations and that the current demand for maritime radiotelegraph services can be adequately satisfied by the remaining coast stations. The ATS report points to certain deficiencies in the cost-revenue data submitted by these carriers, and certain portions of the financial statements submitted by the carriers have been challenged by the Communications Workers of America in its reply comments to which these carriers have not had an opportunity to respond. Since the financial viability of the industry is one of the most basic of the issues in this proceeding, an accurate picture of the current financial status of the industry should be further developed. Variations in the accounting procedures and cost allocations employed by the different carriers preclude the direct comparison of cost-revenue relationships between coast stations or carriers. Therefore, for each coast station which is collocated with another radio station in a different service, such as point-to-point, we request that the carrier provide as part of this proceeding the following information for each such station by service for each year from 1966 through 1973: the revenue derived for each service, the direct costs of each service, the allocated cost for each service, the allocated net book value for each service, and the methodology used to arrive at these costs. We also request that each carrier specify for each coast station for the years 1966 through 1973 the revenues derived from the landline charges associated with the receipt and forwarding of marine messages and whether these amounts were included in the revenue figures previously submitted in this docket. Finally, in this regard and after receipt of the above information, we are directing the staff to pursue any matters relating to the financial aspects of coast stations which have not been clarified in this proceeding and to request the carriers to provide such additional information or clarification as may be necessary for a detailed examination of the financial statements submitted in this inquiry. This information will be placed in the official file of this docket and will be available for inspection by all interested parties.

5. Of equal concern in this proceeding is the technical updating and operational improvement of public coast radiotelegraph stations to improve the quality and efficiency of the maritime services provided to ships at sea, as well as the upgrading of coast stations necessary for the implementation of a high quality radioteleprinter service and the introduction of a selective calling system. We do not believe that the closure of certain coast stations as presently requested is in and of itself

an achievement of these goals. Therefore, we are requesting that proposals be prepared by carriers seeking closures and submitted to the Commission for the implementation of an improved public coast radiotelegraph service with fewer stations from the standpoint of their remaining facilities. In this context, information regarding new equipment, services and/or facilities that would be required, the additional staffing required at the remaining stations, and methods to be employed in providing an improved quality of service to maritime users should be examined by the current licensees in light of the total system concept and other improvements discussed in the ATS report. The resulting coast station configuration must not only have the capability to handle the volume of maritime traffic currently handled by a carrier's existing coast stations on a coast-by-coast basis, but must also be capable of providing a higher quality of present maritime service offerings with greater efficiency, as well as providing for the implementation of a high quality radioteleprinter service. Such an affirmative plan, together with supporting technical and financial information, should be submitted to the Commission as a part of this inquiry.

6. It appears to be the general tenor of the comments filed in this proceeding to date, that competition on each coast with stations capable of handling comparable volumes of maritime radiotelegraph traffic is the most desirable of the feasible industry structures. We have no reason at this time to believe that the public interest in high quality maritime radiotelegraph services could be better served either by establishing a monopoly by selecting, either by choice or by default, a single licensee to operate all public coast radiotelegraph stations on each or all coasts, or through the entry of limited coast radiotelegraph stations. We also believe it desirable for maritime users and shipboard operators to have available a meaningful choice of coast stations from which to obtain service and that messages be routed through the coast station which can provide the quickest and most efficient service at any particular time. In this connection, we will examine the extent to which the existing ship station licensing arrangement of granting ship licenses to RCA Global Communications and ITT World Communications, instead of the ship owners, restricts the availability of such a freedom of choice in actual practice. Comments regarding this matter are requested.

7. In this regard, it is also noted that, apart from some general statements that there is a need for high quality maritime radiotelegraph services, there is no clear definition of the desired volume or quality of the services wanted by the customers of the existing public coast stations. Without such a clear definition of maritime user requirements, we cannot be in a position to assure that any affirmative plans proposed by the major carriers for the reconfiguration of their existing coast station networks will in fact provide the type, quality, and level of the services actually desired by the maritime users. We therefore urge the users or user associations to submit their requirements in terms of desired volume and quality of service that should be provided by public coast radiotelegraph stations at specific ports or by geographic area.

8. The Commission considers this proceeding a matter of urgency and feels that the public interest requires our prompt resolution of this matter. The time afforded for the filing of comments on the ATS report and the filing of the affirmative plans of the major carriers and a definition of user requirements appears sufficient for interested parties to prepare and submit the necessary items. The reply comment period may be utilized to modify carrier plans to accommodate stated requirements not previously addressed. Any request for extension of time to file these items or reply comments must clearly establish that the comments to be filed are of such consequence to the resolution of the problems in the proceeding that the public interest requires us to extend the time period.

9. In view of the foregoing, a Second Notice of Inquiry in Docket No. 19544 is hereby adopted. Authority for this action is contained in Sections 4(i) and 403 of the Communications Act of 1934, as amended. Interested persons may file comments on or before April 15, 1974 and reply comments on or before May 1, 1974. Comments and reply comments shall be filed pursuant to Section 1.419(b) which requires, among other things, an original and 14 copies of all filings. All relevant and timely comments and reply comments filed in this Docket will be considered by the Commission before further action is taken. The Commission may also take into account other pertinent information before it in addition to specific comments elicited by the Notice in this proceeding. Responses will be available for public inspection during regular business hours in the Commission's Public Reference Room at its headquarters in Washington, D.C. Service of comments and reply comments on other parties to the proceeding as required in the first Notice of Inquiry will not be required with respect to filings in the Second Notice of Inquiry.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-216

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint of
LOREN RIVERS, THOMAS RIVERS, STACEY HANCHETT, JOHN HICKS, CATHY FLEMING, KATHY KELLEY, JAMES LOHR, ROBERT LIZZARI, EILLEY PEATMAN, ZACHARY PEATMAN, BRENT GODDARD, KEVIN GRAVES, CURTIS GRAVES, RAYMOND KELLEY AGAINST STATION WMTW-TV, POLAND SPRING, MAINE AND STATION WPTZ-TV, PLATTSBURG, N.Y.

MEMORANDUM OPINION AND ORDER

(Adopted February 27, 1974; Released March 5, 1974)

BY THE COMMISSION:

1. On July 10, 1973, the Broadcast Bureau issued a letter to Loren Rivers, *et al.* (petitioners), concluding that the broadcast of certain commercials for a toy mouse on Station WMTW-TV, Poland Spring, Maine, and on Station WPTZ-TV, Plattsburg, New York, did not appear to violate any Commission policy or rule, or provision of the Communications Act. Now under consideration are: (1) an application dated August 13, 1973, seeking review of that action, filed pursuant to Section 1.115(g) of the Commission's Rules, by counsel on behalf of the petitioners; (2) oppositions to the petition filed by Mid New York Broadcasting Corporation (Mid New York), licensee of Station WMTW-TV, and by Rollins, Inc. (Rollins), licensee of Station WPTZ-TV, dated August 27 and 24, 1973, respectively; and a reply filed September 10, 1973, by the petitioners.

2. The commercials in question depict a 59-cent toy mouse with a "magician's motor", which consists of beeswax attached to a string. Some confusion was caused by the use of the word "motor." The content

of the 60-second toy commercial is set out below.[1] Orders for the mouse were mailed to the stations and forwarded by them en masse to a Mr. Vincent Brennan, the seller/advertiser of the toy. In January 1972 the advertisements were broadcast in at least 16 markets on the East Coast including WPTZ–TV, Plattsburg, New York and WMTW–TV, Poland Spring, Maine.

3. WMTW–TV reviewed the commercial and, with the consent of the advertiser, added an audio tag indicating that there was a money-back guarantee. The commercial was broadcast, but WMTW–TV determined that the commercial might be misleading and initiated a survey among area children to determine whether they were misled by it. The survey indicated that while most children were not misled, some were. The commercial was removed from the air on January 22, 1972. Station WPTZ–TV also reviewed the advertisement and found that it did not on its face raise any suspicions as to the toy's function or use. Upon receipt of a complaint that the toy did not perform as advertised the commercial was stopped (February 10, 1972) and the Federal Trade Commission's assistance was sought in determining whether the commercial was deceptive. On February 6, 1972 counsel on behalf of Loren Rivers, *et al*, filed a complaint with the Commission that Stations WMTW–TV and WPTZ–TV broadcast advertisements for a toy mouse that misrepresented its performance; that the commercials constituted false or misleading advertising; that the stations failed to comply with the fairness doctrine; and failed to comply with the Commission's policies on licensee responsibility for advertising broadcast.

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[1] See the following:

Video	*Audio*
c/u Mouse in Action	ANNCR: IT'S FEEDING TIME FOR THE WILD AH-BER-REE-SIAN MOUSE, WE CALL HIM MICKIE. HE'S A TRICK MECHANICAL MOUSE. HE'LL DO ALL KINDS OF TRICKS.
Turns & runs other way	HE TURNS TO THE RIGHT, HE TURNS TO THE LEFT, AND HE'LL ROLL OVER TOO.
Show 'Motor'	NOW HERE IS WHAT MAKES MICKIE WORK. RIGHT UNDER HIS NOSE IS WHAT IS CALLED A MAGICIAN'S MOTOR. IF YOUR FRIENDS ASK TO SEE IT, SHOW HIM THE MOUSE, BUT NOT THE MOTOR.
Put 'motor' on coin	PLACE THE MOTOR ON A COIN WHEN YOU GO TO A RESTAURANT AND ORDER A HOT DOG OR A HAMBURGER AND LEAVE THE WAITRESS A TIP. WHEN YOU LEAVE, THE TIP GOES WITH YOU.
Shows coin move	
Replace 'motor' on mouse	NOW PUT IT BACK ON THE MOUSE. MAKE SURE TO PUT IT UNDER THE NOSE AND NOT BACK HERE. THE ONLY TIME YOU PUT IT BACK HERE IS WHEN THE WIND IS BLOWING TO KEEP IT OUT OF HIS EYES.
Mouse runs backwards	
Puts 'motor' under nose	NOW IF YOU WOULD LIKE TO GET MICKIE, HE'S JUST 59¢ AND IF YOU WOULD LIKE TO GET MINNY TOO . . .
M/S Dollar & 2 Boxes	. . . YOU GET THEM BOTH FOR ONLY ONE DOLLAR . . .
Mouse in Action	PLUS THE COIN TRICK . . . AND MANY, MANY MORE.

4. The staff ruling issued pursuant to this complaint held in essence that the primary responsibility for determining whether specific advertising is false or misleading lies with the Federal Trade Commission, which was sent a copy of the complaint, and that the Commission will take cognizance of any determination by that agency. The ruling also stated that the Commission has not applied the fairness doctrine to the type of commercials presented here; that with respect to the broadcast of false or misleading advertising the Commission has not imposed absolute liability on licensees; that the Commission has adopted a standard of reasonable diligence; and that WMTW–TV and WPTZ–TV appear to have complied with this standard. The petitioners request a Commission review of the staff ruling and a modification of this decision to include various suggested forms of relief, which will be specifically discussed in this order.

5. Counsel for Mid New York and Rollins respond to the Application for Review, stating that the staff ruling accurately set forth the law relative to the petitioners' complaint and properly applied that law in rejecting their complaint; that although dated August 8, 1973, the Application for Review was not received by the Commission until August 13, 1973; and that it was thus filed outside of the time period prescribed by Section 1.115(d) of the Commission's Rules (30 days from the release of the Commission staff action.) Although the Application for Review was filed late, we shall consider the matters raised in that pleading on the merits on our own motion. Counsel for Rollins also contends that the application failed to comply with Section 1.115 (b) (2) of the Commission's Rules in that the factors which would warrant consideration of the questions presented were not "specified with particularity." We conclude, however, that the Application fulfilled the requirements of this section.

6. Counsel for the petitioners contends that he did not receive a copy of John C. Flynn's (Vice President-General Manager, Mid New York) affidavit in reply to their complaint before the Commission issued its July 10, 1973 ruling and that his failure to controvert the substance of that affidavit should not be taken as an indication that the petitioners affirm the statement. Counsel on behalf of Mid New York states that a copy of the affidavit and cover letter to the Commission was mailed to the petitioners' counsel on July 10, 1972. In any event, a copy of this affidavit was included in Mid New York's opposition to the application for review and counsel for the petitioners has had an opportunity to respond to its substance prior to the present decision.

7. First, we will consider the petitioners' contention that Station WMTW–TV misrepresented to the Commission that refunds had been made to them. Counsel on behalf of Mid New York replied to this charge that no such representation was made; that the petitioners never received a refund because they never returned the product and requested a refund; and that the station was led to believe that the petitioners were not even interested in refunds because their counsel continued to direct exclusive attention toward using this complaint to change existing law. Counsel for Mid New York further stated that through communication with the manufacturer and through spot

checks with individuals who have returned the product requesting refunds, WMTW–TV has taken affirmative action to assure that the refunds have been made. To this, counsel for the petitioners stated that refunds were requested in his letters of February 15, 1972 to John Flynn, Vice President-General Manager, Mid New York and Cliff Lowery, Director Quality Control, Rollins, and that they now reaffirm their refund request but that because of the passage of time are unable to return the toys. A careful review of this letter to the station does not disclose that the toy was returned or that a specific refund request was made. The letter states:

> . . . My clients feel that the following action would be appropriate: The above broadcasts should offer to repay the purchase price upon return of the mouse to the station.

Counsel for Mid New York stated that the station will refund the purchase price of the mouse upon its return. WMTW–TV's General Manager-Vice President in his affidavit to the Commission stated that the station refunded the purchase price of the mouse to any person who believed he was misled or was otherwise dissatisfied with it. WMTW–TV never stated to the Commission that refunds were made specifically to the petitioners. WMTW–TV does state that it will refund the price to the petitioners upon return of the toy. Accordingly, we find that no misrepresentation has been made.

8. The petitioners have also requested the Commission to issue an order directing WMTW–TV to refund their money and that of other allegedly defrauded buyers of the toy. In view of the stations' statements it appears that such an order would not be needed. In any event, the Commission does not have authority to direct licensees to make refunds.

9. Counsel for the petitioners also contends that the licensees did not comply with Commission policies outlined in the Public Notice "Licensee Responsibility with Respect to the Broadcast of False, Misleading or Deceptive Advertising", 32 FCC 2d 396 (1961), in that they did not preview the commercial messages, examine the toy prior to the broadcasts, take all reasonable measures to eliminate false, misleading or deceptive matter in the commercial, or take reasonable steps to "satisfy themselves as to the reliability and reputation of the prospective advertiser." Counsel for the petitioners further contends that the National Association of Broadcasters' guidelines followed by WPTZ–TV are not sufficient to satisfy the requirements of the Commission policy statement; and that without adequate guidelines WPTZ–TV cannot protect the public from subtle commercial fraud in advertising.

10. In reply, counsel for Rollins states that it is WPTZ–TV's policy to review advertisements and in any case where there is reason to believe that the advertisement contains claims or representations which seem unlikely or suspicious, further inquiry is made and that this toy advertisement did not violate on its face any of the standards of taste or acceptability of the licensee, nor did it raise any suspicions as to its functions or use. Upon receipt of a complaint that the toy did not perform as advertised, counsel for the licensee states that the commercial was stopped and the FTC's assistance was sought; that at about this

time counsel for the petitioners conveyed their complaint to the licensee; and that counsel for the petitioners then proceeded to make unreasonable demands of the licensee, including directives (in petitioners' counsel's March 15 letter to the station) to "reimburse my clients by return mail at double the rate paid for the mouse"; and "advise when a retraction of the advertisement will be broadcast—this business about waiting for an FTC report is nonsense." Counsel for Rollins explains that the commercial was suspended because some people found that it could be misleading even though it had not yet been found in any way to be fraudulent, deceptive or misleading in a legal sense. Counsel for the licensee contends that the law is absolutely clear on this matter as set forth in the Federal Trade Commission Act (15 U.S. 54(b)), the Commission's Public Notice relative to deceptive advertising, above, and an absolutely unbroken line of case law including *Consumers Association of the District of Columbia*, 32 FCC 2d 400, 23 RR 2d 187 (1971), and *In Re Westinghouse Broadcasting Company*, 40 FCC 2d 1045, 27 RR 2d 670 (1973). Counsel for the licensee states further that in the *Westinghouse* case it was noted that a complaint was in fact pending before the Federal Trade Commission but that the particular advertisements had not yet been found to be misleading or deceptive and that even in that case where a complaint was outstanding, the Commission held that there was no automatic requirement for a licensee to withhold advertisements "for this would effectively resolve the issue against [the advertiser] before he has been fully heard in the forum provided by Congress." Counsel for Rollins submits that what the Commission and the Congress expect is a reasonable response by broadcast licensees to any indication of deceptive advertisements and that licensee's response to this matter has been reasonable. According to Rollins' counsel, the petitioners also filed a complaint with the Vermont Consumer Fraud Division requesting various sanctions against WPTZ–TV and on August 18, 1972 that agency issued a letter which "'concluded that WPTZ was not in violation of our Vermont consumer fraud law . . . [and] that we do not intend to pursue this matter any further.'"

11. On behalf of WMTW–TV, John C. Flynn stated by affidavit that the station has a policy of constantly reviewing all commercial material to assure that it is not misleading; that the toy commercial was reviewed pursuant to this policy; that the Station Management determined that the commercial might be construed as misleading; that the station then initiated a survey among area children; that the survey indicated that while most children were not misled, some were; and that therefore the commercial was removed from the air on January 22, 1972. It is also noted by Mr. Flynn, that the petitioners' complaint (dated February 15, 1972) was not received by the station until February 18, 1972.

12. In reply, counsel for the petitioners states that the Commission's Public Notice on licensee responsibility with regard to misleading advertising provides that prior to acceptance of any advertising material, a licensee should take responsible steps to satisfy itself as to the reliability and reputation of prospective advertisers and as to their ability to fulfill promises made to the public; that the licensees here

have no policy or procedure prior to acceptance of any advertising material in accordance with this requirement; and that after-the-fact removal of fraudulent advertisements is inadequate.

13. The Commission's policies with respect to detecting potentially false and misleading advertising hold licensees to a standard of reasonable diligence. Reasonable diligence calls for a licensee to be alert to obvious areas of concern, in light of his own past experience, or to established policies and past rulings of the Federal Trade Commission, *Consumers Association of the District of Columbia*, 32 FCC 2d at 407. Counsel on behalf of WPTZ–TV stated that the station's policy is to review advertisements and that the toy commercial was so reviewed, appeared acceptable and was therefore broadcast. Although WPTZ–TV has not specifically indicated what steps it took to determine the reliability and reputation of the prospective advertiser, it does state, by counsel, that, "In any case where we have any reason to believe an advertisement might contain claims or representations which seem unlikely or suspicious, we could, of course, make further inquiry before accepting the advertisement." Also, as suggested in our 1961 Public Notice setting out our policy in this area, above, WPTZ–TV subscribes to the FTC's publication, "Advertising Alert," which gives notice of advertising matter which is the subject of corrective action by the FTC. No corrective action had been taken by the FTC with regard to the motor mouse. WPTZ–TV removed the commercial immediately upon receiving a complaint and referred the matter to the FTC.

14. Similarly, WMTW–TV states that it has a policy of reviewing all commercial matter. It appears that it did review the motor mouse commercial, in view of its statement that it required the addition of an audio tag. Although it did broadcast the commercial, it conducted a survey to determine whether children might be misled. WMTW–TV removed the commercial prior to the petitioners complaint, because some, but not a majority of, children were misled by the commercial.

15. In considering the efficacy of the licensee's actions here we must consider the fact that any deception in the commercial is apparently not so obvious as to be detected upon reasonable review and investigation of the advertisement. The nature of the "motor" was visually depicted in the commercial and a majority of children surveyed by WMTW–TV did not find the commercial misleading. On August 18, 1972 the Vermont Consumer Fraud Division issued a letter stating that based on the petitioners' complaint and a response by WPTZ–TV it determined that there had been no violation of the Vermont Consumer fraud law by the station and that it did not intend to pursue this matter further.

16. In *Consumers Association of the District of Columbia*, above, we stated:

> . . . [E]very station must have a program to protect the public in this area. The extent of its program will, of course, depend upon the size and resources of the station, with the larger stations making a correspondingly greater effort in this field. However, somewhere in every station operation (whether it be owner, manager or staff) there must be cognizance of problems regarding deceptive or misleading advertising, familiarity with the important policies and developments

in this area, and the responsibility for determining the acceptability of advertising offered to the station. While reasonable diligence thus varies with the station and with each factual situation, what is called for is a commitment by the licensee to be as vigilant as feasible in his circumstances to protect the public. (32 FCC 2d 407–8).

We believe that the actions of the licensees here are in keeping with the statement quoted. The only point that makes this a close case is the apparent absence of any procedure to inquire as to the reliability and reputation of the particular advertiser, and both licensees are admonished for their failure to do so. However, we do not hold licensees to a standard of absolute liability in this area. Rather, the standard is reasonable diligence. In view of the actions taken here, we believe that, on the whole, the licensees in this case have exercised reasonable diligence and that no further action is warranted. It is therefore unnecessary to direct an order, as petitioners suggest, to the stations to establish procedures for the acceptance and review prior to broadcast of all commercial advertising or to direct an order for a hearing on this matter.

17. Counsel for the petitioners also asserts that the fairness doctrine may be applied to all commercial advertising and contends that whether licensees take reasonable steps to protect the public from false advertising is a controversial issue of public importance, apparently attempting to raise a question as to the stations' compliance with the fairness doctrine. The fairness doctrine provides that if a station presents one side of a controversial issue of public importance, it is required to afford reasonable opportunity for the presentation of contrasting views. However, the petitioners have not submitted the date and the time of the broadcast of any particular controversial issues of public importance; the basis for the claim that the issues *broadcast* were controversial and of public importance; an accurate summary of the view broadcast; the basis for their claim that the station has not broadcast contrasting views on the issues in its overall programming; or indicated whether the station has either afforded or intends to afford a reasonable opportunity for the presentation of contrasting views on those issues. In short, the petitioners have not submitted any information to raise a question as to the stations' compliance with the fairness doctrine, *Allen C. Phelps*, 21 FCC 2d 12, 17 RR 2d 1117 (1969), *FCC Procedure Manual*, 37 F.R. 20510, 20512 (1972).

18. Finally, counsel for the petitioners request us to require that the licensees broadcast the "fact" that they do not preview or examine the content of commercial advertising. However, we believe that such a requirement could be imposed only by the institution of a rule-making proceeding, which, in view of our 1961 policy statement, we find unnecessary to initiate.

19. Accordingly, the petition for review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-211

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of
ROSWELL BROADCASTING CO., INC. (KSWS), ROSWELL, N. MEX.
Has: 1020 kHz, 10 kW, 50 kW-LS, DA-2, U
Requests: 1020 kHz, 50 kW, DA-2, U
STORER BROADCASTING CO. (KGBS), LOS ANGELES, CALIF.
Has: 1020 kHz, 50 kW, Limited Time (Daytime, and 5 Hours on Sunday Nights)
Requests: Change Site and Operate Unlimited Time With 50 Kilowatts
For Construction Permits

MEMORANDUM OPINION AND ORDER

(Adopted February 27, 1974; Released March 7, 1974)

BY THE COMMISSION: COMMISSIONER REID DISSENTING. COMMISSIONERS WILEY AND HOOKS CONCURRING IN THE RESULT.

1. The Commission has before it for consideration the above-captioned applications requesting a nighttime power increase for station KSWS from 10 to 50 kilowatts; an increase in hours of operation for station KGBS from limited time (present operation is essentially daytime only) to unlimited time with 50 kilowatts at a new transmitter site; and a request by KGBS for waiver of sections 1.571(c), 73.25(a), and 73.24(f) of the Commission's rules.[1] The applications were filed on a mutually contingent basis (each application is contingent on a grant of the other).

2. In support of the requested waivers, KGBS has submitted the following comments:

(a) The present KGBS antenna site has been condemned and taken by the State of California and KGBS may be required to vacate the site by February 1973.

[1] Section 1.571(c) requires that applications be processed as nearly as possible in the order in which they are filed. The present note to 1.571 is the result of the recent adoption of new rules, including 73.37(e), to govern the acceptance of applications for standard broadcast facilities, Report and Order adopted February 21, 1973, FCC 73-220, 26 RR 2d 1189, and provides that no application for broadcast facilities (new stations or major changes) in the conterminous United States tendered for filing after July 18, 1968, will be accepted for filing unless it complies fully with the provisions of section 73.24(b) and the provisions of section 73.37(a) through (e). The KGBS proposal fails to comply with 73.37(e) because all of the area to be served already receives service from existing stations. Section 73.25(a) specifies the particular assignments which may be made on the class I-A channels (the requested KGBS operation is not included). Section 73.24(f) requires that the requested facilities must be available for assignment under existing international agreements and the rules and regulations of the Commission. As previously indicated, the requested facilities are not available under the Commission's rules.

(b) The need to move the KGBS site has placed Storer in a serious planning dilemma. Due to scarcity and high cost of land in Los Angeles, KGBS probably could not earn enough revenue to justify the high cost of moving its directional facilities if it were required to continue as a limited-time facility. Accordingly, unlimited-time operation is requested.

(c) KSWS desires to increase its nighttime power from 10 to 50 kilowatts in order to make optimum use of its assignment, but it does not have the resources to pay for the additional construction and operating costs. Storer Broadcasting Company, licensee of KGBS, has agreed to pay all costs incurred in the design of the new KSWS nighttime 50-kilowatt directional antenna system including the preparation, filing and prosecution of the application. Storer has also agreed to pay for certain additional operating expenses which may be incurred by KSWS operating with 50 kilowatts during nighttime hours.

(d) The KGBS and KSWS nighttime proposals have been engineered to protect each other [2] and a grant of both will permit KSWS to serve an unserved area of 1,820 square miles including a population of 3,353 persons. KGBS would bring a new nighttime service to eight million people and an area of 2,325 square miles, providing certain areas with their third, fourth or fifth nighttime primary service redressing the imbalance now suffered by Los Angeles *vis a vis* other major metropolitan centers with respect to allocation of maximum power stations and nighttime service in general. Since Los Angeles has only two fulltime 50-kW stations compared to eight for New York City and five for Chicago, the present distribution of frequencies, hours of operation and power among the several states and communities is unfair and inequitable within the meaning of section 307(b).

(e) The KGBS proposal would not preclude the potential assignment of additional class II–A stations on 1020 kHz, when consideration is given to nighttime operation by KSWS with 50 kilowatts.

(f) Considered together with the mutually contingent KSWS application, the KGBS proposal will permit maximum frequency utilization at Roswell and Los Angeles, providing new service which would not otherwise be available.

(g) The requested KGBS operation will permit KGBS to present special programs directed towards community problems.

(h) A grant of the KGBS application will not serve as a precedent for other applications to be filed for operation on class I–A channels.

(i) Roswell and Storer are adversary parties in the rulemaking proceeding relating to presunrise operation by class II stations (Docket Nos. 17562 and 18036). A grant of the KGBS application will eliminate this problem.

[2] We would note that the present authorization of KGBS contains a condition that it must accept any interference caused by a class II–A assignment and KGBS must afford adequate protection to the class II–A assignment.

3. We first will consider the proposal of KSWS. The present operation of KSWS, a class II–A facility, was authorized under the provisions of sections 73.22 and 73.25 of the rules. Moreover, our rules specify that class II–A facilities may operate with a power of 50 kilowatts both day and night if adequate protection is afforded the dominant station and other existing facilities. This maximum power will tend to eliminate a greater amount of nighttime unserved area, which, as noted in the Clear Channel Decision,[3] is the prime purpose for duplicating some of the class I–A clear channels. Engineering studies submitted with the KSWS proposal establish that adequate protection will be afforded the dominant station on the 1020 channel (KDKA, Pittsburgh, Pennsylvania).[4] In addition, the proposed nighttime directional antenna is designed so as to radiate essentially the same value towards Los Angeles (KGBS) as obtains under the present 10-kW operation. Since the KSWS proposal affords adequate protection to other stations, will extend its nighttime coverage so as to provide service to a substantial unserved area (1,820 square miles with a population of 3,353 persons), and otherwise complies with our rules and regulations, the application could be accepted for filing if it were not contingent on acceptance and grant of the KGBS proposal.

4. The application of KGBS to operate during nighttime hours on 1020 kHz, a class I–A channel, involves a basic conflict with our rules since it is not provided for under section 73.22 or 73.25 and fails to conform with the requirements of section 73.37(e).[5] The provisions of sections 73.22 and 73.25 of the rules are a direct result of the findings and conclusions reached in the clear channel proceeding regarding the assignment of additional facilities on the class I–A clear channels. As noted in footnote 1, *supra*, 73.37(e) was adopted after rule making concerning the acceptance of applications for standard broadcast facilities. Accordingly, before the KGBS application and the mutually contingent proposal of KSWS could be accepted for filing, it would be necessary to grant a waiver of pertinent sections of our rules. As previously indicated, KGBS seeks to extend its hours of operation from essentially daytime only to unlimited time on 1020 kHz. This channel is one of the clear channels under sections 73.25 and 73.22 of the Commission's rules where *one* unlimited-time station, in addition to the class I–A station, may be assigned. The additional unlimited-time facility on this channel has already been assigned and is KSWS in Roswell, New Mexico. In the Report and Order in the Clear Channel Decision (footnote 3, *supra*), the need to keep these channels under strict regulation at night was set forth in great detail and we believe it is unnecessary to once again discuss the basic policy considerations underlying our rules. However, fundamental to the decision in the clear channel proceeding was the conclusion that these channels must be used on a care-

[3] In *The Matter of Clear Channel Broadcasting in the Standard Broadcast Band*, FCC 61–1106, 31 FCC 565, 21 RR 1801, released September 14, 1961.

[4] KSWS has submitted a letter from Westinghouse Broadcasting Company, Inc., licensee of KDKA which indicates that they will interpose no objection to the proposed KSWS 50-kilowatt nighttime operation.

[5] The provisions of sections 73.25 and 73.37 have been previously noted (see footnote 1, *supra*). Section 73.22 specifies the particular states where unlimited-time class II–A stations may be assigned on certain class I–A channels. Neither 73.25 nor 73.22 provides for any new facilities or increased hours of operation on 1020 kHz in the State of California.

fully controlled basis in order that new assignments will provide service, especially at night, to *underserved areas*. This same requirement of providing service to unserved areas is the very foundation of our recently revised rules for standard broadcast station assignment standards which were adopted after extensive rule making (footnote 1, *supra*). We are not suggesting that our rules are inviolable, but if we are to grant waivers of rules which are the very foundation of our allocation goals, we certainly must first conclude that sufficient facts have been presented to warrant a waiver.

5. In support of the requested waivers, KGBS has attempted to establish that its proposal to operate nighttime on a class I–A channel would not subvert our basic allocation rules. This contention appears to be based on the assumption that the additional nighttime signal which would be radiated by KGBS would not result in a situation restricting the Commission's latitude in considering future use of this channel and that a grant of both the KGBS and KSWS proposals would further the Commission's allocation goals of providing nighttime service to areas presently without primary standard broadcast service. We cannot agree. It is axiomatic that each new nighttime operation (on any frequency) results in a radiated signal which contributes to the overall level of interference and may preclude other nighttime assignments which would provide a first primary service to unserved areas.[6] This fact was one of the basic considerations in the clear channel proceeding as well as our recent rule making on standard broadcast station assignment standards. Moreover, it was this fundamental consideration which dictated our conclusion in these proceedings that additional nighttime assignments should not be made unless they would provide a first primary service to a substantial area or population. With regard to the contention that the requested facilities would further the Commission's allocation goals of providing service to unserved areas, it is apparent that KGBS is attempting to achieve its objective of obtaining nighttime operation—an operation which would create an additional interfering signal on the channel and which would merely add one more service to an area where a superabundance of service already exists[7]—by stressing the merits of the KSWS proposal.

6. Another contention made by KGBS is that its proposal is unique and that a grant of the requested waivers and authorization of the proposed nighttime operation would not establish a precedent for the assignment of other applications to be filed on the class I–A channels. This argument apparently is based on the considerations that KGBS already operates daytime (plus a few hours on Sunday nights) on its frequency, a class I–A channel; that the channel has already been duplicated by the unlimited-time class II–A assignment of KSWS in

[6] For example, the nighttime interference level on 1020 kHz in the southwestern part of Oregon caused by the existing operation of KDKA in conjunction with the existing or proposed operation of KSWS is not so great that it would preclude the assignment of a new station which could provide a first primary nighttime service. However, the nighttime interference level in that area which would be caused by the proposed operation of KGBS is so great that it would foreclose any possibility of allocating a new station.

[7] Los Angeles has 11 unlimited-time standard broadcast stations and 17 FM stations. In view of the multiplicity of services already being provided to the city, we can find little merit in the contention of KGBS that a grant of its application would redress an imbalance of power between Los Angeles and some other large cities.

Roswell, New Mexico; that the nighttime operation by KSWS with 50 kilowatts may tend to preclude additional unlimited-time assignments on the channel to the extent that the KGBS operation would not aggravate the situation; and that perhaps only two existing stations presently operating daytime on class I–A channels are in such a unique category as KGBS. We must disagree with these conclusions. In the first place, we have already made it quite clear that each new nighttime signal results in additional degradation of the channel involved. Secondly, if we ultimately authorize additional unlimited-time stations to *any* of the class I–A channels, the assignments certainly will not be restricted or even preferred to those locations where an existing daytime only (or essentially daytime only) station happens to be located. If unlimited-time stations were to be allocated in that manner, they, like the KGBS proposal, would in most instances not provide a first primary nighttime service to any area and would therefore fail to accomplish one of our prime allocation goals.

7. KGBS also seeks to establish that favorable consideration of its requested waivers is supported by its intention of providing a unique nighttime public affairs program dealing with local community problems in twelve of the largest Los Angeles suburban communities. However, we cannot find that this is sufficient basis for waiving our basic rules governing the allocation of broadcast facilities. The multiple stations already licensed in Los Angeles have an affirmative obligation to meet the need and interests of their community and surrounding areas. The listening public can and should make their needs and interests known to the existing nighttime stations so that they can respond to the local programming needs.

8. Finally, KGBS states that the required change in antenna site will involve a heavy financial burden and that authority to operate during nighttime hours is necessary in order to earn sufficient revenue to justify the high cost involved. In this regard, we would note that if the Commission undermines its allocation rules by submitting to the financial problems of individual applicants, the inevitable result will be a deterioration of service provided to the public.

9. In addition to the foregoing matters related solely to basic domestic frequency allocation policy is the fact that the proposed operation does not comply with the provisions of the U.S./Mexican Agreement, Article VIII, C, 2, A, and Annex VII of this Agreement which provides that the protected signal for daytime and nighttime operations shall be the 0.5 mV/m groundwave, and its ratio to the interfering groundwave signal shall be 2 to 1 for 10 kHz separation. The proposed KGBS nighttime 0.25 mV/m contour overlaps the 0.5 mV/m of station XEDX, Ensenada, B.C., Mexico (1010 kHz, 250 W, 500 W–LS, U), in contravention of the aforementioned Agreement. Since the provisions of the Agreement are not subject to waiver, this alone would render the application unacceptable for filing. It may be possible for KGBS to eliminate this violation by modifying the proposed radiation pattern. However, this appears irrelevant since we are denying the requests for waivers of our own rules.

10. We have carefully considered the KGBS requests for waiver of the aforementioned rules, and we have given its proposal the "hard

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look" required by the United States Court of Appeals for the D.C. Circuit in *WAIT Radio* v. *FCC*, 418 F. 2d 1153, 16 RR 2d 2107 (1969); and —— F. 2d ——, —— RR 2d —— (1972). As stated above, we have no problem with the KSWS Roswell proposal, and it is being returned only because it is mutually contingent with the KGBS application. Standing alone, it would result in service to a large unserved area, albeit only some 3,000 additional people, and would, therefore, obviously be in the public interest. It appears clear, however, that the KSWS proposal is not supportable on its own; the costs of serving the small additional audience are far too great to justify the high cost of construction and operation proposed. The question, then, is whether the KGBS proposal, taking into consideration the merits of the KSWS proposal, has sufficient worth to justify grant of the waivers which are necessary if we are to authorize the KGBS proposal.

11. As pointed out by the Court in both of the *WAIT Radio* decisions, "An applicant for waiver faces a high hurdle even at the starting gate." More important in the context of this case, the Court in *WAIT–II* stated that ". . . it suffices to support the Commission's answer, that . . . The Commission is being asked to give up a policy of retention to await future developments, and to surrender flexibility in dealing with allocations problems in the future." The Court in *WAIT–II* also stated that, "The curtailment of future flexibility provides an element of public interest that justifies the Commission in not granting the waiver sought when, as here, the Commission identified aspects of WAIT's proposal which it found raised problems in terms of the public interest." We have fully discussed the "problems in terms of the public interest" inherent in the KGBS proposal. In addition, as we pointed out in paragraph 5, *supra*, each additional nighttime AM authorization contributes to the overall level of interference. If the Commission were to waive its rules in this case essentially to permit the addition of still another nighttime service to the multiplicity of services already available in the Los Angeles area, we could hardly refuse to waive our rules on behalf of other applicants in situations where no interference is indicated under our rules, and where there is not the great multiplicity of service available, as in this case. KGBS argues that its proposal is unique and would not, therefore, create a precedent, but that uniqueness is predicated upon its being a precedent only with respect to other stations already operating on Class I–A channels. We do not believe that it can be so limited a precedent for the reason stated above. In the absence of persuasive showings with overriding public interest benefits, we have refused to waive our rules to accept applications for nighttime facilities which would not provide a first primary service to a substantial area or population.[8] It is obvious that if the clear channels are going to be duplicated and duplicated according to our rules on a systematic and controlled basis to provide service to areas presently without service, then it is certain that the

[8] E.g., *Washington Broadcasting Co., Inc.*, 18 RR 2d 160, 20 FCC 2d 1094 (1970) (KREN, Renton, Washington); *WGBA, Inc.*, 18 RR 2d 352, 21 FCC 2d 493 (1970) (WHYD, Columbus, Georgia). Also see *560 Broadcast Corp.* v. *FCC*, 8 RR 2d 1134 (1966), *Petition for reconsideration denied*, 14 RR 2d 404 (1968). Commission *affirmed*, 135 U.S. App. D.C. 330, 418 F. 2d 1166, 17 RR 2d 2054, (D.C. Cir.) (1969).

public interest will not be served by authorizing another nighttime service for Los Angeles.

12. In view of the foregoing, we find that KGBS has failed to present sufficient reasons, if true, to justify waivers of the rules which would permit acceptance of its application. Therefore, a hearing on the requests for waiver is not required. *United States* v. *Storer Broadcasting Company*, 351 U.S. 192 (1956).

13. Accordingly, IT IS ORDERED, That the KGBS requests for waiver of the aforementioned rules ARE DENIED and that the application of KGBS and the mutually contingent application of KSWS ARE RETURNED as not acceptable for filing.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-183

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
SOUND RADIO, INC., NEWARK, N.J.	File No. BP-19080
FIDELITY VOICES, INC., NEWARK, N.J.	File No. BP-19081
ANDREW W. STANFIELD, HARRY A. O'MEALIA, EVERETT T. FELDER, FRANK J. GUARINI AND NAPOLEON POWELL, A COPARTNERSHIP D.B.A. COMMUNITY ACTION RADIO ENTERPRISES, NEWARK, N.J.	File No. BP-19082
THE BROWN BROADCASTING CORP., NEWARK, N.J.	File No. BP-19084
GREATER NEWARK BROADCASTERS, INC., NEWARK, N.J.	File No. BP-19085
For Construction Permits for Deleted Facilities of WNJR, Newark, N.J. (1430 kHz, 5 kW, DA-N, U)	

MEMORANDUM OPINION AND ORDER

(Adopted February 21, 1974; Released February 28, 1974)

BY THE COMMISSION: CHAIRMAN BURCH ABSENT

1. The Commission has for consideration the above-captioned and described applications; an agreement providing for a merger of Fidelity Voices, Inc. (Fidelity), Community Action Radio Enterprises (Community), The Brown Broadcasting Corporation (Brown), and Greater Newark Broadcasters, Inc. (Broadcasters); and an amendment to the application of Fidelity tendered August 2, 1973, which, subject to Commission approval, would implement the merger agreement. Also under consideration are requests to dismiss the applications of Community, Brown, and Broadcasters, which requests are contingent upon the Commission's approval of the merger of those three applicants with Fidelity. On December 7, 1973, Sound Radio filed a "Petition to Decline Acceptance for Filing or, If Accepted, to Assign New File Number, Return Application of Fidelity Voices, Inc., as Amended to the Processing Line and Dismiss"[1] directed against the amendment which would implement the merger agreement. The four applicants proposing to merge filed a joint opposition to Sound Radio's petition and Sound Radio filed a reply. Later Sound Radio filed a supplement to its petition accompanied by a motion

[1] A recurring request in the pleadings filed by Sound Radio is that the application of Fidelity Voices, Inc., as amended, be "returned to the processing line." Fidelity's application has continuously been on the processing line since it was accepted and will remain on the processing line until further disposition of that application.

for leave to file the supplement (which the Commission accepts) and the merging applicants filed a reply. In addition, the merging applicants filed a "Joint Petition to Reject or Dismiss Amendment" directed against an amendment filed by Sound Radio on December 3, 1973. Sound Radio filed an opposition and the merging applicants filed a reply.

2. The captioned applications are five of a group of nine applications which seek regular authority to operate the facilities of station WNJR, Newark, New Jersey. These five applications were filed in response to the Public Notice of July 15, 1971 (cut-off notice), which fixed September 13, 1971, as the date on which competing applications for the Newark station must be on file to receive comparative consideration with the application of the Gilbert Broadcasting Corporation, file No. BP–19047, the acceptance of which was announced in the July 15, 1971, notice.

3. During the pendency of the Newark applications, Fidelity, Community, Brown, and Broadcasters filed copies of the merger agreement which provides that other interested Newark applicants may join the merged applicant on equal terms. The amendment to Fidelity's application would implement the agreement insofar as Fidelity, Community, Brown, and Broadcasters are concerned. It is proposed that 25 percent of the stock of Fidelity will be made available to the principals of each of the merging applicants. No other consideration is involved. It is this arrangement that Sound Radio urges the Commission to reject or, in the alternative, accept the amendment simply as a vehicle for the purpose of summarily dismissing the four pending applications.

4. As the procedural ground for rejecting Fidelity's amendment or the alternative dismissal of the applications of the four merging applications, Sound Radio relies on the provision in the Commission's rules governing the processing of standard broadcast applications which states that a new file number will be assigned to an application for a new station when it is amended to specify a change in ownership as a result of which one or more parties with an ownership interest in the original application do not have, on a collective basis, a 50 percent or more ownership interest in the amended application. Section 1.571(j)(2) of the Commission's rules. In its supplement to its petition, Sound Radio noted the Commission's recent observation in ruling on amendments to an application for a construction permit for a television station which conflicts with an application for a renewal of the license of television station WFAA–TV, Dallas, Texas, *Belo Broadcast Corporation (WFAA–TV), et al.*, —— FCC 2d ——, 29 RR 2d 89, released December 26, 1973. In *Belo*, the Commission recognized that in applying section 1.571(j)(2) to standard broadcast applications:

> **The assignment of a new file number results in the application being treated as a new one and losing its right to comparative hearing status if the time for filing applications mutually exclusive with renewal applications under Section 1.516(e)(1) has elapsed.**

5. The joint petitioners, on the other hand, urge the rejection of the December 3, 1973, amendment to Sound Radio's application on the apparent ground that the amendment introduces "a substantial

amount of *new* and *changed* participants." (Joint petitioners' emphasis.) The joint petitioners do not cite any specific rule or precedent for this extraordinary procedure, but make reference to the cut-off notice in this proceeding which the joint petitioners describe as "ad hoc."

6. Both Sound Radio and the joint petitioners urge grounds, substantive in nature, for the rejection of the amendments to the Fidelity and Sound Radio applications. Sound Radio claims that the amendment to the Fidelity application will give advantages to the merging applicants to the prejudice of the non-merging applicants with respect to the comparative factors of integration of ownership and management and ascertainment of community problems. Sound Radio also argues that the Fidelity amendment strengthens its financial showing. Sound Radio comments on the alleged advantages in some detail. The joint petitioners, without citing specifics, claim that the Sound Radio amendment will improve Sound Radio's comparative position on integration and broadcast experience factors and possibly on minority participation factors.

7. At the outset, it seems appropriate to correct a misconception of the joint petitioners, apparently shared to some degree by Sound Radio, that the so-called "ad hoc" cut-off notice in some manner alters the provisions of the rules relating to the pre-hearing procedures on standard broadcast applications for construction permits. Conceivably, the cut-off notice applicable in this case may be described as "ad hoc" in some respects. For instance, it is concerned solely with the WNJR facility in Newark, New Jersey. Admittedly, the language in the notice is not identical in all respects to language in other such notices issued by this Commission. The only purpose of the notice in question, as has been the purpose of the hundreds of other such notices published since April 1959, is to fix a date beyond which an application in conflict with the application listed in the notice is barred from comparative consideration. Neither the Newark cut-off notice nor any other cut-off notice issued by the Commission has been intended to bar pre-designation amendments otherwise permitted within the limitations imposed by the pre-hearing and pre-grant standard broadcast application procedures. Any pre-designation amendment to the Sound Radio and Fidelity applications, not otherwise proscribed by a specific provision in the rules, may be filed as a matter of right. See section 1.522(a) of the rules.

8. The amendment of applications prior to designation for hearing for the purpose of improving an applicant's comparative position or its basic qualifications is commonplace. The Commission does not, in the pre-hearing stage, examine amendments and compare the amended application with competing applications to determine which applicant may have comparative advantages, and the Commission does not deprive an applicant of the right to attempt, by amendment, to improve its comparative position. Certainly, there is no rule or policy which can deprive an applicant of the right to attempt to establish its basic qualifications at the pre-hearing stage by filing amendments to a pending application. A determination on comparative factors is the proper function of the hearing process.

9. A comment on Sound Radio's contention that the amendment to Fidelity's application would result in "stronger financial qualifications" appears to be in order. Actually this contention is with reference to an amendment filed subsequent to the amendment intended to implement the merger agreement. In support of its allegation that Fidelity's amendment renders Fidelity's financial qualifications stronger, Sound Radio cites two examples. The first example is a letter from a banking institution committing the bank to lend Fidelity $100,000. Sound Radio speculates: "Whether the new loan could have been obtained without the merger may be questionable." In the material filed by Fidelity, there is no hint that the bank is relying on the merger in agreeing to make the loan. Rather, the loan is subject to three specific conditions. First, Fidelity must receive a final and uncontestable permit from the Commission. Second, the loan commitment is conditioned on personal guarantees. Fidelity has given no indication who the personal guarantors may be or whether they are willing to guarantee the loan. Third, the personal guarantees of repayment must be with appropriate collateral, but Fidelity gives no indication of what that collateral will be or whether it exists.

10. The second example referred to by Sound Radio is what it describes as the "substantial balance sheet" of Mr. James Brown, said to be relied upon by the other three merging applicants. As a matter of fact, there is no indication that the other three merging entities will rely on Mr. Brown's "substantial balance sheet." The balance sheet apparently was submitted in an attempt to establish Mr. Brown's ability to purchase $25,000 worth of stock. According to the amendment, this is Mr. Brown's only obligation to the corporation. As for the balance sheet itself, it does not appear to be complete. Two assets claimed by Mr. Brown are interests in stations WRDW, Augusta, Georgia, and WJBE, Knoxville, Tennessee. The Commission's records indicate that Mr. Brown also holds an interest in station WEBB, Baltimore, Maryland, but WEBB does not appear on the balance sheet. Two of Mr. Brown's long-term liabilities are mortgages on an aircraft and a residence. However, the Commission cannot assume, as the balance sheet seems to suggest, that no part of these liabilities is current. Moreover, if the date (February 28, 1972) at the foot of the balance sheet following the description, "stockholders equity" (by which is meant individual net worth, apparently), is intended as the date of the balance sheet, the balance sheet is nearly two years old and not sufficiently current to provide a basis for a finding that Mr. Brown will be able to purchase corporate stock at a cost of $25,000. This does not constitute a complete analysis of Fidelity's financial showing, but examination of the recent bank letter and Mr. Brown's balance sheet indicates that Fidelity, far from establishing a stronger financial position, has yet to establish its basic financial qualifications.

11. The question to be resolved in disposing of the joint petitioners' request to reject or dismiss Sound Radio's amendment is whether any rule or policy of the Commission would require or even countenance such action. Even assuming the joint petitioners' contention that Sound Radio's amendment introduces "a substantial amount of new and changed participants" is accurate, the answer to the question must be

in the negative. The dispositive factor in ruling on the joint petitioners' requests is that, as a result of the amendment, individuals who are original parties to the application retain an interest of 58.1 percent. Therefore, section 1.571(j)(2) of the rules does not apply. Even if Sound Radio's amendment resulted in the relinquishment of a collective interest of more than 50 percent, thereby bringing section 1.571(j)(2) into play, the Commission would not, as a matter of practice, summarily reject the amendment. Rather, Sound Radio would be given the option to revise its amendment to avoid being assigned a new file number pursuant to section 1.571(j)(2) of the rules or to dismiss its application voluntarily. The petition to dismiss Sound Radio's amendment will be denied.

12. The proper disposition of the Fidelity amendment is not quite so obvious as that of Sound Radio's. First, the Commission must reject out of hand the suggestion that Fidelity's amendment should be accepted simply as the basis for a capricious little ritual to end with the arbitrary dismissal of four pending applications. Such a suggestion has no more merit than two previous Sound Radio demands that a pending application be summarily dismissed. *W.M.E.D. Associates, Inc., et al.*, 39 FCC 2d 292, 26 RR 2d 877; *W.M.E.D. Associates, Inc.*, 40 FCC 2d 651, 27 RR 2d 161. The three applicants proposing to dismiss their application have requested dismissal on the express condition that the Commission approve the merger agreement. Therefore, if for any reason the Commission is unable to approve the merger, the applications will not be dismissed.

13. Next, there is the matter of section 1.571(j)(2) of the rules which, as previously noted, provides that, where an application for a new standard broadcast station is amended to change ownership when original parties to the application do not retain, on a collective basis, a 50-percent interest, the application will be assigned a new file number. In Fidelity's amendment, original parties to the application will retain only 25 percent interest. On othe other hand, section 311(c) of the Communications Act of 1934, as amended, confers upon competing applications the right to merge subject to Commission approval. The question thus presented is whether the right conferred by statute must be denied by the mechanical application of a rule of agency procedure. If the merger agreement and implementing amendment had been timed differently, i.e., filed after designation for hearing, section 1.571(j)(2) would not apply. *Great River Broadcasting, Inc.*, 12 FCC 2d 561, 12 RR 2d 1151 (1968, Review Board). The Commission concludes that, in the present circumstances, the right to merge should not be denied. Four timely applicants propose to merge without the introduction of any new parties. Among the purposes of section 1.571(j)(2) is not only the avoidance of repeated reprocessing of applications but also the avoidance of a situation in which, at the eleventh hour, an applicant might be confronted with an unanticipated adversary. Here, the Commission has been aware for some time that at least four applicants for the Newark facility were contemplating a merger, and the staff has refrained from engaging in the process of examining the applications to an extent which might result in unnecessary effort. More-

over, the applicants who do not choose to join the merged applicant have been on notice of the prospect of competing with an applicant or applicants which include the individuals who now are the potential principals of Fidelity Voices. The Commission finds that the present situation warrants a waiver of section 1.571(j)(2) on its own motion.

14. The parties to the merger agreement have furnished statements outlining the history of the negotiations leading to the merger and point out that the merger of four applicants, and perhaps others, should tend to simplify the Commission's choice in the forthcoming hearing. The Commission recognizes that any applicant not now a participant in the merger may become a participant at its own election. The Commission also recognizes that Sound Radio has represented that it has no interest in joining the merger. The Commission, by its present action does not intend to influence any applicant to join the merger. Any applicant not a participant in the merger may either join in the merger or continue to compete separately for the Newark facility as it chooses.

15. A reduction in the number of applicants in this proceeding from nine to six, perhaps fewer, should, to some degree, simplify the hearing which will be ordered at a later date, and, hopefully, will permit an earlier choice of the best qualified applicant to provide a regular broadcast service in Newark. Accordingly, the Commission finds that the proposed merger is in the public interest and will, pursuant to section 311(c) of the Communications Act of 1934, as amended, approve the agreement. In approving the agreement under consideration, the Commission specifically approves that provision which permits any applicant not now a participant in the merger to join the merged applicant upon the same terms applicable to those applicants now participating.

16. One final matter requires disposition. In urging the dismissal of the applications of Fidelity, Community, Brown, and Broadcasters, Sound Radio draws attention to section 1.571(b) of the rules which requires that a major change in ownership by amendment to an application requires the publication of a notice of the amendment pursuant to section 1.580 of the rules. In opposition, the merging applicants contend that such a publication would be redundant and unnecessary and should not be required.

17. The Commission believes that, in the present instance, the notice provided for by sections 1.571(b) and 1.580 should not be required. Notices of the filing of the merging applicants have been published previously on an individual basis. The Commission has received no objections from any party not now involved in this proceeding, and the Commission expects that the hearing on the Newark applications can be instituted in the not too distant future. When a hearing is ordered, the applicants will then be required to publish a notice of the hearing. Therefore, there appears to be no useful purpose to be served by requiring republication at this time.

18. Accordingly, IT IS ORDERED, That the petitions of Sound Radio, Inc., and the Joint Petitioners ARE DENIED.

19. IT IS FURTHER ORDERED, That, pursuant to section 311 (c) of the Communications Act of 1934, as amended, the merger agreement IS APPROVED; that, on the Commission's own motion, the provisions of section 1.571(j)(2) of the rules are waived; and the amendments to the application of Fidelity Voices, Inc., ARE ACCEPTED.

20. IT IS FURTHER ORDERED, That, the amendment to the application of Sound Radio, Inc., IS ACCEPTED.

21. IT IS FURTHER ORDERED, That, the applications of Community Action Radio Enterprises, The Brown Broadcasting Corporation, and Greater Newark Broadcasters, Inc., ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-219

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF WDMG, INC., LICENSEE OF RADIO STATION WDMG DOUGLAS, GA.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted February 27, 1974; Released March 5, 1974)

BY THE COMMISSION:

1. The Commission has under consideration (1) its Notice of Apparent Liability for forfeiture dated September 19, 1973 (mailed September 24, 1973), addressed to WDMG, Inc., licensee of Radio Station WDMG, Douglas, Georgia, and (2) the licensee's response of October 23, 1973 to the Notice of Apparent Liability.

2. The Notice of Apparent Liability for forfeiture of $2,500 issued in this proceeding,[1] indicates that the licensee failed to operate the station as set forth in the station license and violated Section 73.87 of the Commission's Rules in the following respects:

(a) An inspection of Station WDMG on November 10, 1972 indicated that the station was operated in the non-directional mode until a later hour than authorized by the license,[2] as follows:

September 1972 Licensed for nondirectional mode until 6:45 p.m., eastern standard time (e.s.t.), or 7:45 p.m., eastern standard time (advanced), being eastern daylight time (e.d.t.)

Operated nondirectionally until:	*e.d.t.*
2	8:15 p.m.
21	8:00 p.m.
24, 26	9:00 p.m.
27	10:02 p.m.
28	8:33 p.m.

October 1972 Licensed for nondirectional mode until 6 p.m. eastern standard time (e.s.t.) or 7 p.m. eastern standard time (advanced) being eastern daylight time (e.d.t.)

Operated nondirectionally until:	*e.d.t.*
17	7:55 p.m.
24	9:55 p.m.
27	8:20 p.m.
28	8:00 p.m.

[1] The proceeding was confined to those violations which occurred within one year prior to issuance of the Notice of Apparent Liability.
[2] Station WDMG is authorized to operate on 860 kilohertz at a power of five kilowatts with directional antenna at night.

November 1972 Licensed for nondirectional mode until 5:30 p.m., eastern standard time (e.s.t.)

Operated nondirectionally until:	e.s.t.
1	6:30
2	6:00
7	6:30

(b) The inspection also indicated that, in violation of the terms of the station license, no daily record was kept in the operating log of data regarding common point currents, base currents, antenna monitor sample loop currents and phase indications within two hours after commencement of operation of the directional antenna by remote control for September 2, 3, 9, 10, 16, 17, 23, and 24, October 1, 3, 7, 8, 14, 15, 21, 22, 27, 28, and 29, and November 4 and 5, 1972.[3]

(c) The inspection also indicated that the required weekly readings of the base current ammeter and the associated remote meter and the calibration of these two meters had not been included in the maintenance log of the station since July 31, 1972, in violation of Section 73.114(a)(1)(i) of the Commission's Rules.

3. In response to the Notice of Apparent Liability licensee cited its prior good record and stated that the amount of the forfeiture seemed excessive compared with forfeitures for ". . . far more serious matters . . ." such as broadcast of obscene programs and fraudulent billing. In addition licensee stated:

Section 73.114(a)(1)(i): The failure to log the weekly base current and remote antenna meter readings in the maintenance log was due to gross confusion on the part of the Chief Operator at the time, as stated in our previous reply last fall; however, the management was under the impression that all of these weekly base current and remote antenna meter readings were being made and logged as required by the station license. We know full well that just thinking that these responsibilities had been met is not enough. Now the Management double checks everything.

Non-Compliance with Terms of Station Authorization: In addition to what was stated in our previous reply we feel that if an honest mistake was ever made it was this one. We failed to take the common point current, base currents, phase monitor sample loop currents and phase indications within two hours after commencement of operation of the directional antenna by remote control on the days specified in your letter in September, October and November, 1972 because of our understanding that the July 1972 amendments of Section 73.93(e)(3) of the rules required that they be made *five* days a week. You will note that the days the readings were not made were Saturdays and Sundays with the exception of two in October. The Chief Operator at the time, in this case, was adhering to the instructions of the Management in that the Management was advised by legal counsel (who was apparently unaware that the station was operated by remote control) that these readings were only required five days per week. It is understood by all involved now that these readings are to be taken and recorded

[3] The pertinent provision of the station license reads as follows:

"During Operation by Remote Control

"During operation by remote control, remote indications of antenna base current for each tower, and common point current shall be read and entered in the operating log at least once each half hour. The indications at the transmitter, of the common point current, base currents, phase [antenna] monitor sample loop currents and phase indications shall be read and entered in the operating log once each day. These readings must be made within two hours after the commencement of operation with the directional antenna by remote control."

daily within two hours after the pattern change. This has always been the practice of WDMG and the only time we have wavered in this requirement was on the dates listed in your inspection. You can rest assured that if the new rule had not been misinterpreted those readings would have been made seven days a week as had been the practice previously and as is being done now and since the November 10, 1972 inspection.

As stated in our previous reply, the discrepancies in the time of change from the daytime to nighttime mode resulted from a recurring failure of the station's remote switching gear. During this time the station had to be made directional, manually, from the transmitter. The station Management knew of this failure in the remote switching gear and had the Chief Operator go each evening at the time of directional to the transmitter site to change the pattern. We thought this was being done regularly. The remote switching gear has been repaired and has been operating successfully since the inspection. As we stated before, we now have a competent Chief Operator and he has given explicit instructions along with the management to take the carrier off the air the instant the remote switching gear fails to perform properly, if and when this ever happens again.

Licensee requested reduction or remission of the forfeiture.

4. Licensee's contention that the amendment of Section 73.93(e)(3) of the Rules (effective July 14, 1972) created confusion as to the requirements for logging certain directional antenna parameters is not persuasive. As then amended the rule provided for recording such observations "[a]t least once each day, 5 days each week, *unless required more frequently by the terms of the station authorization*, or, rules governing operation by remote control . . ." [emphasis added]. Licensee's license required daily logging of such parameters. There was no further change in Section 73.93(e)(3) until the January 10, 1973 Report and Order in Docket No. 18455, 38 FCC 2d 1125.[4] Licensee will not be excused because it acted on advice of counsel. *Industrial Broadcasting Co.*, 34 FCC 2d 950 (1971). The fact that some of the violations may have resulted from employee error does not relieve the licensee of liability. We have long held that licensees are responsible for the acts and omissions of their employees. *Eleven Ten Broadcasting Corp.*, 32 FCC 706 (1962). We recently stated that, ". . . it is the primary responsibility of the station licensee to comply with the Commission's rules and the terms of the station authorization, and to provide proper instruction and supervision of all operators." Report and Order in Docket No. 18930, adopted June 1, 1972, 35 FCC 2d 290. As for licensee's contention of excessive forfeiture, operation with unauthorized facilities (here non-directional operation at times when directional operation was required) has always been considered a major violation because of the potential for harmful interference. Licensee's prior good record does not excuse these violations.

5. Considering all of the above, we find that during the period September 24, 1972 through the days specified above in November 1972 the licensee violated the terms of its station license and Sections 73.87 and 73.114(a)(1)(i) of the Rules. We are not persuaded by any information presented by the licensee to set aside or reduce the amount of the forfeiture stated in the Notice of Apparent Liability.

[4] The requirement was then transferred to Section 73.114(a)(9)(ii), effective April 20, 1973, which provides in relevant part: "For stations operated by remote control, where phase indications are not observed and entered in the operating log at the remote control point, the entries required . . . shall be based on observations made at the transmitter not more than two hours after the time of commencement of operation with each directional radiation pattern . . ."

6. In view of the foregoing, IT IS ORDERED, That WDMG, Inc., licensee of Station WDMG, Douglas, Georgia, FORFEIT to the United States the sum of two thousand five hundred dollars ($2,500) for repeated failure to operate Station WDMG as set forth in the station license and for repeated violation of Sections 73.87 and 73.114(a)(1)(i) of the Commission's Rules. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument payable to the order of the Federal Communications Commission. Pursuant to Section 504(b) of the Communications Act of 1934, as amended, and Section 1.621 of the Commission's Rules, an application for mitigation or remission of forfeiture may be filed within thirty (30) days of receipt of this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*